(30,562)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 597

BENJAMIN W. MORSE, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 4, 1924

[fol. 1] **IN UNITED STATES DISTRICT COURT**

PETITION FOR WRIT OF HABEAS CORPUS—Filed Feb. 6, 1923

To the Honorable the District Court of the United States in and for the Southern District of New York:

The petition of Benjamin W. Morse, respectfully shows that he is a resident of Boston, State of Massachusetts, and is now actually imprisoned and restrained of his liberty and detained by power of the authority of the United States in the custody of the United States Marshal for the above named district by reason of the fact and circumstances, and not otherwise. Except as is hereinafter stated, your petitioner is not committed or detained by virtue of any process or mandate issued by any Court of the United States, or by any Judge thereof; nor is he committed or detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or the final order of such tribunal made in a special proceeding instituted for any cause except to punish him for contempt; nor by virtue of an execution or other process issued upon such a judgment, decree or final order. The cause or pretense of the imprisonment or restraint, according to the best of the knowledge and belief of your Petitioner, is that Petitioner was arrested, apprehended and taken into custody in the Southern District of New York, on February 6, 1923, by said Marshal by virtue of an alleged warrant issued out of the above named court based upon an alleged indictment against your Petitioner and others said to have been found by the Grand Jury in said Court in the Southern District of New York on April 27, [fol. 2] 1922; your Petitioner further states, upon information and belief, that said indictment is invalid and does not state a crime, and does not state facts sufficient to constitute a crime, as therein alleged, and that the validity of said indictment has been passed upon by the United States District Court for the District of Connecticut, in the case of United States against Harry F. Morse, and that it was held and decided by said court that said indictment was invalid and it was so declared by order of said court. A copy of said order and the opinion filed therewith is attached hereto marked Exhibit "A" and made a part hereof.

Wherefore your Petition- prays that a writ of habeas corpus issue directed to the said Marshal commanding him to produce Petitioner before this Honorable Court, together with the true cause of the detention of Petitioner to the end that inquiry may be had in the premises; and Petitioner respectfully requests that he may be permitted on the hearing of said writ to submit such further affidavits and documents as he may be advised in support of his said application and that pending the hearing and determination upon said writ that Petitioner be admitted to bail under said writ in such reasonable amount as to the Court may seem proper.

Dated, the 6th day of February, 1923.

Benjamin W. Morse. Nash Rockwood, Charles Tressler Lark, Attorneys for Petitioner.

Office and Post Office Address, 527 Fifth Avenue, Borough of Manhattan, New York, N. Y.

[fol. 3] Jurat showing the foregoing was duly sworn to by Benjamin W. Morse, omitted in printing.

[File endorsement omitted.]

[fols. 4 & 5] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Writ of Habeas Corpus Requiring the United States Marshal to Produce the Body of BENJAMIN W. MORSE

RETURN TO WRIT OF HABEAS CORPUS—Filed March 10, 1923

William C. Hecht, United States Marshal for the Southern District of New York, respectfully makes the following return to the writ of habeas corpus herein:

First. Respondent alleges that the petition for the writ of habeas corpus herein is insufficient in that it does not state any facts sufficient to authorize the issuance of such writ.

Second. The grand jurors of the United States of America for the Southern District of New York did present to the United States District Court for the said District an indictment against the same Benjamin W. Morse and others and the said indictment was duly filed in this Court on April 27, 1922.

Third. That thereafter, to wit, on May 10, 1922, a bench warrant was issued out of this Court upon the said indictment for the apprehension of the said defendants.

Fourth. That the defendant Benjamin W. Morse was taken into custody in the Southern District of New York in pursuance of said aforesaid bench warrant and was detained by me under authority thereto.

[fols. 6 & 7] Fifth. On information and belief, thereafter on February 6, 1923, the defendant was duly arraigned before the United States District Court in the said Southern District of New York and a plea of not guilty was entered to the aforesaid indictment and bail in the sum of $15,000 was fixed pending trial upon the said indictment, which bail was not furnished by the said Benjamin W. Morse.

Wherefore, your respondent prays that the writ of habeas corpus herein may be dismissed and that the said Benjamin W. Morse be remanded to the custody of the United States Marshal for the Southern District of New York to be dealt with according to law.

William C. Hecht.

Jurat showing the foregoing was duly sworn to by William C. Hect, omitted in printing.

[File endorsement omitted.]

[fol. 8] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF BENJAMIN W. MORSE—Filed June 19, 1924

STATE OF NEW YORK,
County of New York, ss:

Benjamin W. Morse, being duly sworn, says:

I submit the following affidavit in support of my application by writ of habeas corpus, verified February 6th, 1923, and to vacate and set aside my said arrest, and as a traverse and reply to the "return to writ of habeas corpus," filed herein on the 17th day of February, 1923, by William C. Hecht, United States Marshal for the Southern District of New York, and in accordance with the provisions of the revised statutes of the United States, I suggest to the Court the facts herein contained in addition to the averments in my petition for said writ of habeas corpus, in support of my contention that my arrest and detention by the United States Marshal for the Southern District of New York, as set forth in said writ of habeas corpus, was wholly illegal, unauthorized, without warrant of law, a violation of my constitutional rights, and that I was arrested and detained without jurisdiction or proper authority.

[fol. 9] In January, 1922, two indictments were returned against me, in connection with others, by a Grand Jury in the District of Columbia. The first indictment, known as Criminal Indictment No. 38753, was returned by a Grand Jury in the Supreme Court of the District of Columbia and is entitled "United States v. Charles W. Morse, Erwin A. Morse, Harry F. Morse, (this deponent) Benjamin W. Morse, George M. Burditt, Nehemiah H. Campbell, Rupert M. Much, Philip Reinhardt, Leonard D. Christie, William W. Scott, Richard O. White and Colin H. Livingstone." In said indictment I am charged, in connection with said other defendants, with having committed the crime of conspiracy to defraud the United States and to commit an offense against the United States by defrauding the United States Shipping Board Emergency Fleet Corporation, as provided by Section 37 of the Federal Code. The second of said indictments is known as Criminal No. 39033, and was returned by a Grand Jury in the Supreme Court of the District of Columbia in January, 1922, and is entitled "United States v. Charles W. Morse, Erwin A. Morse, Harry F. Morse, (this deponent) Benjamin W. Morse, George M. Burditt, Nehemiah H. Campbell, Rupert M. Much, Philip Reinhardt, Leonard D. Christie, William W. Scott, Richard

O. White and Colin H. Livingstone." I am charged in connection with said other defendants in said indictment, with having committed the crime of conspiracy to defraud the United States, as pro-
[fol. 10] vided by Section 37 of the said Federal Penal Code. I was arraigned upon both of said indictments, pleaded not guilty to each thereof, and was admitted to bail on each indictment in the sum of $10,000. I furnished bonds in said amounts, with George Ray, a resident of Washington, D. C. as my surety. My said bonds were duly approved by the Court and I was ordered by the Court to be released from the custody of the Marshal and was thereupon placed in the legal custody of my bondsman. Said bonds have at all times been in full force and effect since said time, and were in full force and effect at the time of my arrest herein in the Southern District of New York, on the 6th day of February, 1923, and I was at said time and am now in the legal custody of my said bondsman in said Washington, criminal cases.

Said criminal cases in the District of Columbia were at issue and had been peremptorily set for trial in the Supreme Court in said District of Columbia, by Justice Wendell P. Stafford, for 10:30 A. M. of February 6th, 1923, and all defendants were directed by the Court to appear at said time for trial.

I reside at Boston, Mass., and in order to attend said trial at Washington on February 6th, 1923, I left Boston on February 5th, 1923, by the Federal Express of the New York, New Haven & Hartford Railroad Company, which was the usual and shortest and most direct railroad route to Washington, D. C. As I was en route to Washington on said train and asleep in my berth thereon, I was forceably seized by the United States Marshal at New York City, as said Federal Express passed through New York City, and was forceably taken from the train at the Pennsylvania Station, and subjected to said
[fol. 11] arrest by said Marshal, from which I seek to be discharged herein upon the ground that the same was and is wholly illegal, unauthorized, and in violation of my constitutional rights. I inquired of the representatives of said Marshal at the time of my said arrest by what authority I was taken into custody, and he thereupon exhibited to me a bench warrant issued upon an indictment found against me in April, 1922, in the Southern District of New York, which is hereafter referred to, which said bench warrant was dated July, 1922. I was taken by said Marshal and his assistants from said train to the Federal Building in New York City, notwithstanding the fact that I explained in detail and at length to the said Marshal and his assistants that I was on my way to attend the trial of my criminal cases at Washington on the morning of February 6th, 1923, in Justice Stafford's court. I requested permission to telephone to my counsel, Nash Rockwood, who was at the Willard Hotel, at Washington, D. C., awaiting the calling of my said case on the morning of February 6th, and was refused permission to do so by said Marshal and his assistants, and I was told that I could not communicate with my said counsel. I was detained against my will in the office of the Marshal in the Federal Building, on said day, from about two o'clock in the morning of February 6th

until I was thereafter and during the afternoon of February 6th released by order of United States Judge Winslow, upon my application for a habeas corpus, and upon my furnishing bail approved by the Court in the sum of $15,000. By reason of said arrest and de-
[fols. 12 & 13] tention I was wholly unable to proceed with my journey to Washington, and when my case was called before Justice Stafford on the morning of February 6th, at 10:30 A. M., I was unable to be present in court.

In April, 1922, I was also indicted by a Grand Jury in the Southern District of New York, charged with having committed the crime of conspiracy to defraud the United States and to violate Section 37 of the Penal Code, and Section 215 of the Penal Code by using the mails to defraud, in the matter of the sale of stock of the United States Steamship Company. A bench warrant was issued upon said indictment, which was the same bench warrant upon which I was arrested on February 6th, 1923, as hereinbefore detailed. Said bench warrant was sent to the United States Attorney in the State of Massachusetts, and proceedings under the United States Revised Statutes to remove me from my place of residence in the State of Massachusetts to the Southern District of New York
[fol. 14] were instituted by the United States in Massachusetts in July, 1922, before U. S. Commissioner Hayes, 2nd. Such proceedings were then had that after a full hearing including the taking of extended testimony and the introduction of much documentary evidence and the submission of briefs upon the law and facts, I was discharged by the Commissioner on February 8th, 1923, who declined to commit me for removal to the Southern District of New York. The opinion of said Commissioner Hayes was as follows:

UNITED STATES OF AMERICA,
District of Massachusetts:

UNITED STATES OF AMERICA

vs.

BENJAMIN W. MORSE

This is to certify that I, William A. Hayes, 2nd, United States Commissioner for the District of Massachusetts, have on this 8th day of February, 1923, found that the evidence submitted by the defendant is sufficient to overcome the presumption of the Indictment, and that I have, therefore, discharged the defendant.

(Signed) William A. Hayes, 2nd, United States Commissioner. (Seal.)

My bond was thereupon discharged and exonerated and I continued in the custody of my Washington bondsman. My brother Harry F. Morse, was also arrested in Connecticut in removal proceedings upon the same indictment and such proceedings were there had that he was held by the Commissioner for removal to the Southern Dis-

trict of New York, and was committed to the Marshal pending application for a warrant of removal to the United States Judge of the District. He immediately applied by writ of habeas corpus and certiorari for his discharge, and the United States, at the same time, applied to Hon. Edwin S. Thomas, United States Judge, for a warrant for his removal. Pending the decison of said application he [fol. 15] was released upon bail, and during all of said times my bail in the District of Columbia was, as aforesaid, in full force and effect.

Said proceedings upon the application of the Government for my brother's removal to the Southern District of New York and his application for a discharge upon writ of habeas corpus and certiorari were consolidated and heard together, and after a full consideration of both applications, and on January 25th, 1923, Judge Edwin S. Thomas, United States Judge for the District of Connecticut, granted his application for discharge upon writ of habeas corpus, and denied the Government's application to remove him to the Southern District of New York. Judge Thomas at said time had full jurisdiction of the subject matter and of his person under the provisions of Section 1014 of the Revised Statutes of the United States. I annex hereto and make a part of this affidavit, the same as if herein written at length, a copy of the opinion of Judge Thomas granting the said discharge of my said brother, Harry F. Morse, and denying the right of the United States to remove *me* to the Southern District of New York. The order of Judge Thomas so discharging him and denying the right of the United States to remove him to the Southern District of New York had not been appealed from by the United States at the time of my said arrest on February 6th, 1923.

In the argument of the United States Attorney and of my brother's counsel before Judge Thomas, the United States Attornew urged that [fol. 16] the indictment charged the commission of a criminal offense under the Federal Laws, and was legally sufficient as an indictment, and was prima facie evidence of probable cause. The question of the legal sufficiency of the indictment was therefore squarely and directly before Judge Thomas for decision, and was submitted to him both by the Government and by my brother's counsel. Judge Thomas held, in his opinion which is submitted herewith, that the said indictment in the Southern District of New York, upon which I have now been arrested in New York as hereinbefore detailed, did not charge the commission of a criminal offense against the laws of the United States and that upon the facts of the case as shown before the Commissioner probable cause to believe me guilty of a criminal offense against the United States was not made out by the Government.

At the time of my arrest in the Southern District of New York, the proceedings in Connecticut before United States Judge Thomas had fully terminated, and my brother had been and was discharged from the custody of the United States in Connecticut, and his bond in said proceedings in Connecticut was fully exonerated and it had been determined that the United States was without legal right or authority to remove him to the Southern District of New York for trial

upon the illegal indictment aforesad. On the 6th day of February, 1923, when I was arrested herein, as aforesaid, I was in the legal custody of my bondsman upon the indictments found in the Washington jurisdiction, and was also in the custody of my bondsman in the Massachusetts District as I had also been required to and had given bond there in said removal proceedings pending before Commissioner Hayes.

The United States of America was the complainant against me both in the New York and the Washington jurisdiction.

[fol. 17] The consent of the Court in Washington, nor the consent of Judge Wendell P. Stafford, before whom my trial was set for February 6th, as aforesaid, was not asked or obtained for my arrest and detention in New York, or for my removal to the Southern District of New York.

I submit to this honorable Court that my arrest in the Southern District of New York was a violation of my constitutional rights under [fol. 18] the due process clause of the Constitution of the United States, and an illegal deprivation of my liberty, for the reason, among others, that the same operated to prevent my attendance in Washington on February 6th, 1923, when my criminal cases were actually set for trial, thereby rendering liable to forfeiture the bond which I had given in the Washington jurisdiction.

I further submit that inasmuch as my brother, Harry F. Morse, had been discharged by United States Judge Thomas in the District of Connecticut in proceedings wherein said Judge had jurisdiction both of his person and of the subject matter, said decision was final and conclusive upon the United States until reversed upon appeal.

I further submit that the indictment found against me in the Southern District of New York was and is wholly illegal and does not charge an offense under Federal Statutes, and did not warrant my arrest or detention, as aforesaid, and that there was an entire absence of weight or jurisdiction thereunder to authorize the restraint of my personal or the deprivation of my liberty.

I further claim and submit that the said indictment so returned against me was illegally found, for the reason that there was improperly and illegally present before the Grand Jury which returned said indictment an unauthorized person, to-wit, one Fletcher Dobyns, who appeared before the Grand Jury pursuant to an apparent authority given to him by Hon. Harry M. Daugherty, Attorney General of the United States, purporting to appoint said Dobyns as a special assistant to the Attorney General, with authority to appear before the [fol. 19] said Grand Jury. The letters so appointing the said Dobyns are filed with the Clerk of this Court, and are as follows:

"CBS-VHB. November 21, 1921.

Fletcher Dobyns, Esq., Special Counsel U. S. Shipping Board, Washington, D. C.

SIR: In connection with the investigation and prosecution of alleged violations of sections 35, 37, 47, 46, and 48 of the Criminal Code of the United States, Section 41 of the Act of September, 1916,

as amended by the Act of July 15, 1918, and of other provisions of law in the District of Columbia, the Eastern District of Virginia, the Eastern District of Pennsylvania, the Southern District of New York, the Districts of Maryland, Connecticut and Massachusetts, and other judicial districts, by certain corporations, to-wit:

The Virginia Shipbuilding Corporation,
The Groton Iron Works,
The United States Steamship Company,
The Binghamton Steamship Company,
The Huron Steamship Company,
The St. Paul Steamship Company,
United States Ship Corporation,
Steamship Operating Company,
Hudson Navigation Company,
United States Transport Company,
Minneapolis Steamship Company,
C. W. Morse & Company,
Travellers Steamship Company,
Traders Steamship Company,
Transfer Steamship Company, and
United States Transport, Import and Export Company,

and by individuals acting in behalf of said corporations as officers, directors, employees, agents and attorneys, in connection with the construction of shipyards and their appurtenances in certain of said districts, the construction of ships for, and the operation thereof by, the United States Shipping Board Emergency Fleet Corporation, and the presentation of claims to the same, and to the United States, growing out of such transactions, you are hereby appointed a Special Assistant Attorney General and are authorized and directed, as such Special Assistant to the Attorney General, to conduct, in any of said districts, and in any other district, any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct.

[fol. 20] You are to receive no compensation other than that received by you as Special Counsel, United States Shipping Board.

Respectfully, (Signed) H. M. Daugherty, Attorney General."

"CBS. April 1, 1922.

Fletcher Dobyns, Esq., Special Counsel U. S. Shipping Board, E. F. C., 45 Broadway (Room 521), New York City.

SIR: In connection with the investigation and prosecution of alleged violations of Section 37, 215 and 216 of the Criminal Code of the United States and of other provisions of law, in the Southern District of New York, and in other judicial districts by the following named persons, to-wit:

Charles W. Morse, Erwin A. Morse, B. W. Morse, Harry F. Morse, B. Murray, George M. Burditt, R. M. Much, Nehemiah Campbell,

R. O. White, Martin J. Gillen, Stuart Gibboney, William A. Barber, James A. Lynch, Mark L. Gilbert, G. S. Foster, H. E. Boughton, W. Sheridan Kane, William Dennis, James O'Brian, Jams B. Nelson, Arthur Kohler, Lawrence Bremer, Maurice O. Purdy, Arthur Braun, Edward Lucas, Harvey A. Willis, A. U. Rodney, J. D. Sugarman, Frank Epps, E. M. Fuller, L. L. Winkelman, Frank Batman, E. H. McHenry, A. J. Krebs, Jr., Samuel D. Disbrowk, George J. Strong, Dexter Rood, Jr., William Guggenheimer, B. C. Higley, by persons doing business under the firm names of Slattery & Co., Jones & Baker and Schmidt & Baery, and by other persons concerned in the conduct of the business and the sale of the capital stock of the following named concerns, to-wit:

United States Steamship Company,
Frederik Steamship Company,
Bedford Steamship Company,
Newport Steamship Company,
Northland Steamship Company,
Owego Steamship Company,
Chemung Steamship Company,
J. G. McCullough Steamship Company,
Lansing Steamship Company,
[fol. 21] Wm. Castle Rhodes Steamship Company,
Fong Suey Steamship Company,
Binghamton Steamship Company,
Minnesota Steamship Company,
Huron Steamship Company,
St. Paul Steamship Company,
Steamship Operating Company,
United States Transport, Import and Export Company,
United States Transport Company, Inc.,
Hudson Navigation Company,
Groton Iron Works,
Virginia Shipbuilding Corporation, formerly American Shipbuilding Corporation,
United States Ship Corporation,
United States Steamship Company of Delaware (proposed),
C. W. Morse & Company, Incorporated,
Robert Palmer & Sons Shipbuilding & Marine Railway Co.,
Woodlaw Corporation of Saratoga (Morse Park, Inc.),
General Realty Co.,
New York-Knickerbocker Real Estate Co.,
New York, Albany & Troy Transportation Co.,
Albany River Trust Co.,
Morse Securities Co.,
New York & Buffalo Steamship Co.,
New York, Norfolk & Washington Steamship Co.,
Gunston Hall Steamship Co.,
Betsey Bell Steamship Company,
Venada Steamship Co.,
H. F. Morse Steamship Co.,

E. A. Morse Steamship Co.,
Clemens C. Morse Steamship Co.,
Jennie R. Morse Steamship Co.,
Anna E. Morse Steamship Co.,
Colin H. Livingston Steamship Co.,
Georgie M. Morse Steamship Co.,
Follard Steamship Co.,
Nameang Steamship Co.,
Worcester Steamship Co.,
Quinnipine Steamship Co.,
Merry Mount Steamship Co.,
Hartford Steamship Co.,
Honnedaga Steamship Co.,
Provincetown Steamship Co., and
Hopatcong Steamship Co.;

You are hereby authorized and directed as Special Assistant to the Attorney General, to conduct, in any of the said districts, any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct.

You are to serve without compensation other than received by you as Special Counsel, United States Shipping Board.

Respectfully, (Signed) Guy D. Goff, Acting Attorney General."

[fol. 22] At the date of said letter the said Dobyns was and ever since has been Special Counsel of the United States Shipping Board and United States Shipping Board Emergency Fleet Corporation (hereinafter called the Fleet Corporation). Said Fleet Corporation is a private business corporation organized and existing under the laws of the District of Columbia. At the date of said letter he was not and never since has been an officer of the Department of Justice. At the date of said letter the said Dobyns was not and never has since been compensated or agreed to be compensated by the Department of Justice or from any appropriation made for the Department of Justice or any subdivision thereof or for expenditure under the direction of the Attorney General of the United States in the conduct of his duties as head or in the conduct of the work of the Department of Justice. For his services in conducting said proceedings before the grand jury which resulted in the indictment herein, the said Dobyns was to be compensated and theretofore was agreed to be compensated, as I am informed and believe, exclusively out of funds of the Shipping Board and Fleet Corporation; and I am informed and believe that prior to the date of said letter said Dobyns was acting, and ever since July 29, 1921, up to a comparatively recent time he has acted exclusively under the authority, direction and control of the Fleet Corporation or of the United States Shipping Board (hereinafter in this affidavit called the "Shipping Board") and not under the control or direction of the Attorney General;

[fol. 23] Fletcher Dobyns, Esq., is and over since on or about July 29, 1921, has been one of the Attorneys for the Shipping Board and Fleet Corporation. He is not now and never during that period has been an officer of the Department of Justice. Upon information and belief he is and during all of said period has been compensated for his services by the Shipping Board and Fleet Corporation. He is not and has not been or agreed to be compensated by the Department of Justice or any subdivision there. There is no provision of law under which Mr. Dobyns is or was authorized to be appointed specially or otherwise without compensation or while an attorney of the Fleet Corporation to conduct grand jury trials. Section 3 of the Merchants Marine Act of 1920 does not authorize an attorney employed pursuant thereto to conduct such proceedings. The pretended appointment or designation of Mr. Dobyns by the Attorney-General of the United States, of which a copy is set forth herein, was not in pursuance of or in compliance with the Act of Congress of July 30, 1906 (34 United States Statutes at large, page 816). I am informed and believe that neither his said so-called letter of appointment by the Department of Justice, nor a certified copy thereof, nor any oath thereunder, nor his appointment or employment as an attorney of the Shipping Board or Fleet Corporation, nor a certified copy thereof, nor any oath thereunder, has been filed in this Court. Mr. Dobyns was in charge of the grand jury proceedings which resulted in the indictment in the Southern District of New York. He appeared before such grand jury, not as a witness, but in control of and during the presentation to the grand jury of the evi-[fol. 24] dence on which the indictment herein was found. He is not nor during any of the times herein mentioned has he been United States attorney or a member of the staff of the United States Attorney for the Southern District of New York.

The proceedings before, and the submission of evidence to, the grand jury which resulted in and on which the indictment herein is based were, at the instance of and solely under the direction and control of the Fleet Corporation, or the Shipping Board; such proceedings were not, as required by law, conducted by, or under the control of the United States Attorney for the Southern District of New York or any member of his staff, and were not conducted by any attorney or counsellor authorized or appointed, therefore, under any provision of law, nor were they specifically directed by the Attorney General of the United States.

In a motion heretofore filed in the Southern District of New York by defendants jointly indicted with deponent, seeking to set aside and quash the said indictment because the said Fletcher Dobyns appeared before the grand jury in the Southern District of New York, the said Fletcher Dobyns filed his affidavit dated May 18, 1922, in the course of which said Fletcher Dobyns deposed as follows:

"Southern District of New York, ss:

Fletcher Dobyns, being first duly sworn, on his oath, deposes and says on or about the 29th day of July, 1921, I was appointed Special

Counsel for the United States Shipping Board Emergency Fleet Corporation to investigate the transactions on Charles W. Morse and his associates with said Fleet Corporation. As a result of an exhaustive investigation, I reached the conclusion, that Mr. Morse and his associates have been guilty of violating certain sections of the Criminal Code of the United States and laid the matter before the Attorney General of the United States. Thereupon the Attorney General requested me to present the evidence which I had obtained to a grand jury, or grand juries, as the circumstances might require. He then addressed to me the following letter (setting out letter of November [fol. 25] 21, 1921 purporting to appoint the said Fletcher Dobyns as Special Assistant to the Attorney General). On the 29th day of November, 1921, I executed and filed in the Department of Justice the following oath:

'I, Fletcher Dobyns, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office of Special Assistant to the Attorney General of the United States on which I am about to enter, so help me God.'

(Signed) Fletcher Dobyns.

'Subscribed and sworn to before me this 29th day of November, A. D., 1921. J. Pierson Jones, Notary Public.' (Seal.)

* * * * * * *

"During the investigation and presentation of this case to the grand jury I have received instructions and advice from the Attorney General and his assistants and have not received instructions or advice from the Fleet Corporation or from anyone else.

I did not learn until February 7th, 1923 that the statements so made by Mr. Dobyns as to the sources and extent of his authority to appear before said grand jury in New York and the grand jury in the District of Columbia, resulting in indictments against me in both jurisdictions, was fully disputed by the Hon. Harry M. Daugherty, Attorney General of the United States. There has just been brought to my attention, and I have just obtained a printed book issued by the Government Printing Office, Washington, D. C., entitled, "Charges of Hon. Oscar E. Keller against the Attorney General of the United States" and containing at length in 573 printed pages the hearings before the Committee on the Judiciary in the House of Representatives, extending from November 16, 1922, and concluding on December 21, 1922, in the matter of the charges of the said Keller against the said Attorney General.

Specification No. 9 of the said charges against the said Attorney General printed at length on page 58 of the said printed book spe- [fol. 26] cifically charges that the said Harry M. Daugherty, as Attorney General of the United States:

"Did prostitute his high office for purpose of personal vengeance seeking and obtaining an indictment of the said Morse and of his sons as directors of the Virginia Shipbuilding Corporation on a charge of having violated the Federal Statutes; that at the same time the said Harry M. Daugherty obtained the indictment of three attorneys said to have advised the company in connection with the alleged illegal acts but failed, neglected and refused to seek indictments of other directors of the company equally guilty of the alleged violation of the Federal Statute, if any, and also failed to seek the indictment of another attorney—equally guilty with the 'attorneys indic-ted, the said principal attorney being holder of a position of great responsibility and trust in the office of the Attorney General."

The answer of the Attorney General to this specification was as follows (p. 59 of the printed book):

"The Attorney General begs leave to inform your Honorable Committee that the connection of the Department of Justice with the so-called Morse indictment was wholly formal and in proof thereof alleges and states to your Committee as follows:

That the facts and circumstances justifying the return of the indictment in question arose out of certain transactions which Mr. Morse and his co-defendants had with the United States Shipping Board subsequent to the entry of the United States into the World War; that the United States Shipping Board had and maintained its own legal department, and as such, investigated the facts giving rise to such indictments; that while it is true that certain of the attorneys representing the United States Shipping Board bore the title of Special Assistant to the Attorney General without pay they were at no time subject to the direction and control of the Department of Justice, and, in fact, were never directed or controlled by the Department of Justice, but were subject solely to the direction and control of the United States Shipping Board and those charged with the administration of its legal affairs. The Attorney General did not direct that any person, a director or otherwise, should, or should not, be indicted, but left that matter to the officials in charge of the investigation."

In the same printed book, at p. 547 thereof, appears the testimony of Colonel Guy D. Goff, who was the Acting Attorney General who signed an order of appointment of Fletcher Dobyns as Special Assist- [fol. 27] ant to the *to the* Attorney General, dated April 21, 1922, subsequent to the finding of the indictments in the jurisdiction of the District of Columbia, hereinbefore referred to. Colonel Goff testified, among other things, as follows:

"Mr. Howland: Mr. Goff, may I ask your attention to specification No. 9, on page 46 of the facts?

Mr. Classon: What is that?

Mr. Howland: I say specification No. 9 in the committee proof, page 46, and in the hearings——

Mr. Classon: Well, we don't care about that; we have the committee print.

Mr. Goff: It is on page 47.

Mr. Howland: Yes, in the committee print page 47. That refers to the Virginia Shipbuilding Corporation and the charge attempted to be made is that a certain man by the name of Morse was indicted because of some previous relation which he sustained with the Attorney General of the United States. What is the situation in reference to that so-called Morse indictment, Mr. Goff, as you are informed on the subject?

Mr. Goff: The so-called Morse indictment grew out of certain transactions which Mr. Morse had with the United States Shipping Board Emergency Fleet Corporation. These transactions were reported to the Department of Justice by the legal department of the United States Shipping Board for such action as the Department of Justice might conclude was warranted in the premises. In due course the papers were sent to the District Attorney whose district had jurisdiction. This case was sent to the United States Attorney for the District of Columbia. I was present on two several occasions when the Attorney General stated to the general counsel of the United States Shipping Board that the Department of Justice did not care to have anything to do with this prosecution and that inasmuch as the United States Shipping Board had a very large and experienced staff of lawyers that the Attorney General, would prefer that all matters connected with the Virginia Shipbuilding Corporation, one of Mr. Morse's corporations, and with Mr. Morse, his sons, and others, be conducted solely by the legal staff of the United States Shipping Board in conjunction with Major Peyton Gordon, the United States District Attorney for the District of Columbia. That was so understood, and to my knowledge, so far as my knowledge goes, the Attorney General gave no directions to these attorneys as to what they should do.

[fol. 28] Mr. Morse at one time during the absence of the Attorney General in the West on official business went abroad and the Department of Justice was requested to use its good offices with the State Department to have Mr. Morse intercepted and asked to return to this country. I, personally, took the matter up with the State Department in conjunction with Mr. Schlessinger, the general counsel of the United States Shipping Board. The Attorney General himself personally knew nothing of these proceedings and, in fact, was not in the District of Columbia at the time they occurred. As a result the French authorities intercepted Mr. Morse when the Paris landed at Havre and he was returned to the United States as an undesirable citizen to the French Government. Shortly thereafter Mr. Fletcher Dobyns, an attorney of Chicago, Illinois, and a member of the local staff of the United States Shipping Board, who had sole charge of the Morse matter applied to the Department of Justice for authority to appear before the United States Grand Jury. Such authority could, of course, be given him only by appointing him a special assistant to the Attorney General of the United States, charging him with the responsibility of prosecuting this case. He was appointed as the

Special Assistant Attorney General of the United States and was appointed without pay because he was already on the salary list of the United States Shipping Board. I think as to that, although I may be mistaken, I signed his appointment as Acting Attorney General; and he went to the office of the United States District Attorney here and presented with the United States District Attorney the issues involved in the so-called Morse indictment to the grand jury. I could say, if an opinion be permissible, that I do not think the Attorney General of the United States either suggested or indicated, or controlled, directly or indirectly, or otherwise, the presentation of this case, or the names of the others who should be presented to the grand jury for indictment.

Mr. Foster: And the indictment grew out of an investigation of the same nature of the matter by the so-called Walsh Committee?

Mr. Goff: Yes, sir.

Mr. Foster: Which investigated Morse's different companies through a period of two years?

Mr. Goff: They furnished the basis of the investigations.

Mr. Foster: Report of which is filed in the House?

Mr. Goff: Yes, sir."

Until I read the printed book containing the Keller charges from [fol. 29] which I have given quotations above, I had no knowledge whatever that the proceedings before the Grand Jury of the District of Columbia resulting in my indictment, including the appearance of Mr. Fletcher Dobyns before the Grand Jury, were not directed and controlled by the Attorney General of the United States. I did not know that the appointment of Fletcher Dobyns as Special Assistant to the Attorney General was purely formal, nor did I know that Mr. Dobyns had sought such appointment as the representation of the Shipping Board or the Fleet Corporation. I am advised by my counsel, and verily believe that the appearance of Mr. Fletcher Dobyns before the Grand Jury, and his activities therein resulting in my indictment were, and are, wholly illegal and constituted the presence before said Grand Jury of an unauthorized person in direct violation of law, and in violation of my constitutional rights; and I am making this affidavit at the earliest opportunity.

I believe that my inclusion as defendant in the indictment herein was procured by Flecher Dobyns, Esq., as Special Counsel of the United States Shipping Board Emergency Fleet Corporation through the abuse and misuse of the process of this court in the manner aforesaid in that said Fletcher Dobyns appeared before said grand jurors in the Southern District of New York and presented evidence, examined witnesses, and discussed said case resulting in the indictment found against me in the Southern District of New York, as aforesaid. The appearance and the participation in the proceedings before said Grand Jury in the Southern District of New York, by the said Fletcher Dobyns, as aforesaid, was, as I charge the fact to be, without authority and contrary to the laws of the United States, in that the [fol. 30] said Fletcher Dobyns was not "thereunto specifically directed" by the Attorney General of the United States, and was not

present in said grand jury room pursuant to any appointment by the Attorney General of the United States under any provision of law of the United States and the appearance and the participation of said Fletcher Dobyns in the proceedings before said Grand Jury were, and constitute, an abdication by the Attorney General and by the Department of Justice of the United States of his, or its, duties and functions under the laws of the United States, and an attempt by the Fleet Corporation to assume and exercise such duties and functions of the Attorney General and of the Department of Justice without authority of law, and through an attorney of the Fleet Corporation to institute and conduct the prosecution herein including the conduct of the grand jury proceedings which resulted in the indictment herein to the great prejudice, and in violation, of my rights and of the rights of each and every defendant herein.

In the quotations hereinbefore given from the so-called Keller charges and the reply of the Attorney General thereto, when the Attorney General refers to the so-called Morse indictments, he means and intends to refer to the indictment in this case against this deponent, together with other indictments now pending in the Southern District of New York; when the Attorney General speaks in said answer of certain of the attorneys of the United States Shipping Board who bore the title of special assistants to the Attorney General without pay, he means and intends to refer among others to the said Fletcher Dobyns; when the Attorney General states in said [fol. 31] answer that said Special Assistants to the Attorney General were at no time subject to the direction and control of the Department of Justice, and, in fact, were never controlled or directed by the Department of Justice, but were subject solely to the direction and control of the United States Shipping Board and those charged with the administration of its legal affairs, he means and intends to refer to, the said Fletcher Dobyns and to his conduct in connection with the finding of the indictment in this present case, and he means and intends that neither he, the Attorney General, nor the Department of Justice, ever directed or controlled the said Fletcher Dobyns, specifically and otherwise; when the Attorney General states in his said answer that the connection of the Department of Justice with the so-called Morse indictment was solely formal, he means and intends to say, that the connection of the Attorney General and of his assistants with the present indictment was altogether formal and that he had no actual direction of, or control over, the proceedings leading to said indictment, but that the same were left solely to the said Fletcher Dobyns who was not under the direction or control of the said Attorney General.

I further aver upon information and belief as aforesaid that it now appears from this evidence so recently discovered that the said Fletcher Dobyns was not directed specifically, or otherwise, by the Attorney General of the United States to conduct the said Grand Jury proceedings which resulted in the finding of the indictment in this case.

This affidavit is in support of an application to the Court to vacate [fol. 32] the order of arrest by habeas corpus herein upon the ground,

among others, that the indictment was found under the direction of the said Fletcher Dobyns, who was not specifically, or otherwise, directed by the Attorney General to conduct the Grand Jury proceedings herein, and that his appearance before the Grand Jury in the Southern District of New York was wholly unauthorized and contrary to law and rendered illegal and void any indictment so returned by said Grand Jury, including the indictment found against this deponent, in which he was arrested in the Southern District of New York on the 6th day of February, 1923, as aforesaid.

I further submit that being in the legal custody of my said Washington bondsman, and on my way to attend the trial of my case, as aforesaid, I was immune and privileged from arrest while I was passing through the Southern District of New York to attend court, as aforesaid, in the District of Columbia.

I further specifically reply to the return of the Marshal as follows:

(a) In reply to the first paragraph of the said return I affirm that the said petition for writ of habeas corpus herein was sufficient to authorize the issuance of the writ, and, furthermore, that the additional facts herein stated support and justify the same under the act of February 5, 1867, Ch. 28, 14 Stat. L. 385, which reads as follows:

"The Petitioner or party imprisoned or restrained may deny any of the facts set forth in the return or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended by leave of the court or justice or judge before or after the same are filed, so that thereby the material facts may be ascertained."

And I aver and state the fact to be that the additional facts herein [fol. 33] stated and the suggestions herein contained were and are made by leave of the Court, specifically granted, when this matter came on for argument on the 17th day of February, 1923, before Hon. Francis S. Winslow, United States Judge.

(b) I deny that the indictment found against me by a Grand Jury of the United States of America for the Southern District of New York, as set forth in the second paragraph of the return of said Marshal, was properly found or that the same constituted a legal or valid indictment against me and I aver that the same was and is illegal for the reasons hereinbefore set out.

(c) I admit that a bench warrant was issued out of this Court, as stated in the paragraph marked three of the return of said Marshal for my apprehension, and I aver the fact to be that upon said bench warrant I was arrested for removal in the District of Massachusetts and was discharged from said arrest and said removal denied by Hon. Edwin S. Thomas, United States Judge, as hereinbefore set out.

I admit that I was taken into custody in the Southern District of New York, but I deny that said bench warrant or any process issued upon the indictment found against me in the Southern District of New York was sufficient or legal authority for my detention or arrest, and I deny that the same conferred any authority or right upon the Marshal of the Southern District of New York to detain me or restrain me of my liberty.

[fol. 34] (d) I deny that I was "duly arraigned" before the United States District Court in the Southern District of New York on the 6th day of February, 1923, and I aver that I was brought before said Court entirely against my will and in violation of my constitutional rights and in violation of the due process clause of the Constitution of the United States. I deny that I entered any plea whatsoever at the time of said pretended arraignment, and I deny that bail in the sum of $15,000 was fixed pending my trial upon the said indictment, and I aver the fact to be that my bail of $15,000 was given upon my application to be discharged by virtue of a writ of habeas corpus.

(e) I aver that I was and am detained and restrained of my liberty wholly in violation of my constitutional and legal rights and by virtue of illegal process and that the same constitutes an abuse of process and an unlawful restraint of my liberty, wholly without jurisdiction or authority therefor.

Wherefore the petitioner, Benjamin W. Morse, prays this Honorable Court that the writ of habeas corpus herein may be sustained and that my arrest and detention may be vacated and set aside, and that I be discharged from custody or detention, and that my bail be exonerated and discharged and that the entire proceedings resulting in the restraint of my liberty be declared to have been improper, illegal and in violation of my constitutional rights as guaranteed to me by the Constitution of the United States and the amendments [fol. 35] thereto.

This affidavit is filed with the express permission of the Court.

Benjamin W. Morse.

Sworn to before me this 23rd day of February, 1923. J. Benson Thomas, Notary Public, D. C. (Seal.)

[fol. 36] Jurat showing the foregoing was duly sworn to by Benj. W. Morse omitted in printing.

[File endorsement omitted.]

[fol. 37] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION

WINSLOW, D. J.:

The petitioners seek release by habeas corpus from the custody of the United States Marshal for the Southern District of New York. They were arrested on February 6, 1923, within this district, by the Marshal upon a warrant issued out of this court July 19, 1922 directed to said Marshal. The indictment on which the warrant was issued was filed herein April 27, 1922. It charges the petitioners and twenty-two others with conspiring to use the mails in a scheme to defraud. The petitions on which the writs were issued urge that their restraint is illegal because the indictment is invalid, and does not state facts sufficient to constitute a crime.

[fol. 38] The return sets forth the finding and filing of the indictment and the issuance of the bench warrant. The petitioners traverse the return and set forth additional grounds of attack, in substance:

(1) That the petitioners, at the time of their arrest in this district, were enroute to the District of Columbia to attend the trial of an indictment pending against them and others in that district;

(2) That the decision of the District Judge in the District of Connecticut, petitioners' home district, in removal proceedings brought to secure the removal of the petitioner, Harry F. Morse, from that district to the Southern District of New York, was to the effect that the indictment was invalid and insufficient;

(3) That an unauthorized person was in attendance before the Grand Jury which returned the indictment in this district.

The material facts necessary to a decision are not disputed. There are questions of law, however, requiring consideration.

The petitioners contend that they were immune from this particular arrest for the reason that, when apprehended, they were en route through this district to the District of Columbia, there to answer another indictment and attend their own trial in that jurisdiction. The defendants, at the time of their arrest on the train, were under indictment returned in this district charging them with a felony. They were arrested by a duly authorized officer of the United States acting pursuant to a warrant duly issued out of this Court.

It is a common law rule that suitors and witnesses while going to, attending at and returning from Court are exempt from civil process. 5 Corpus Juris, 565; Larned v. Griffin 12 Fed. 590. The [fol. 39] reason for this rule has been generally recognized as the desire of the Courts to induce suitors to present their controversies for determination and to protect them from being subjected to service of process in a civil suit which could not otherwise reach them, except for their presence in the jurisdiction for the purpose of attending to the particular controversy. This immunity, under

the common law rule, does not, however, extend to one while in custody under criminal process or while attending or returning from his trial on a criminal charge. 3 Cyc. 923.

The petitioners are not privileged from criminal arrest while passing through this jurisdiction to attend a criminal trial, nor yet were they privileged from civil process, even in the District of Columbia or in this jurisdiction, while en route for the purpose indicated. The common law rule is intended to protect suitors voluntarily coming into and going from the jurisdiction.

Scott v. Curtis, 27 Vt. 762.
Netograph v. Scrugen, 197 N. Y. 277, 381.
Ex parte Levi, 28 Fed. 651.

The next question to be considered is the contention of the petitioners that this Court could not or should not assume jurisdiction of the petitioners because they were obligated to appear in the District of Columbia to stand trial on indictments there pending. This contention is without merit. While it is true that it is a well recognized rule of comity that where two Courts have concurrent jurisdiction of the same subject matter, the one which first assumes such jurisdiction holds it to the exclusion of the other until such jurisdiction is exhausted,—that rule has no application to criminal process [fol.40] where the defendant is accused of different crimes in different jurisdictions. The Supreme Court of the District of Columbia has jurisdiction of certain offenses committed within its territory and, presumptively, these defendants were en route to answer the charges in that jurisdiction. In like manner, this Court has jurisdiction of certain offenses committed within its territorial limits and this crime, for which the petitioners are indicted as it appears from the record, is separate and distinct from the crime charged in the District of Columbia. The Court of neither jurisdiction can restrain the other from proceeding on the respective indictments. The petitioners, pending the determination of the applications herein, were admitted to bail and thereby they were free to come and go, only bound to appear in the jurisdictions when required.

Peckham v. Henkel, 216 U. S. 482.
Ex parte Marrin, 164 Fed. 631.

The only remaining question to be considered is the contention of the petitioners that in certain removal proceedings in the District of Connecticut, on the pending indictments, removal to this district was refused on various grounds. Neither the sufficiency of the indictment nor the regularity of the proceedings before the Grand Jury are proper matters of inquiry on habeas corpus.

Ex parte Parks, 93 U. S. 18.
Ex parte Siebold, 100 U. S. 371.
Collins v. Loisel, 262 U. S. 427.

The petitions and writs of habeas corpus will be dismissed.

June 19, 1924.

Francis A. Winslow, U. S. District Judge.

[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DISMISSING WRIT OF HABEAS CORPUS—Filed June 26, 1924

The writ of habeas corpus heretofore allowed to the above named Benjamin W. Morse having duly come on to be heard before the Hon. Francis A. Winslow, District Judge, at a term of this Court, held on the 26th day of June, 1924, and after hearing Nash Rockwood, of counsel for petitioner, in support of said writ, and John E. Joyce, Esq., Assistant to the United States Attorney, in opposition thereto, and due deliberation having been had thereon, on motion of William Hayward, United States Attorney, it is

Ordered that said writ be and the same hereby is dismissed, and it is

Further ordered, that the said Benjamin W. Morse surrender himself into the custody of the United States Marshal for the Southern District of New York on or before the 10th day of July, 1924.

Enter.

Francis A. Winslow, United States District Judge.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 18, 1924

And now comes Benjamin W. Morse, by Nash Rockwood, his attorney, and in connection with his petition for an appeal, says that in the record and proceedings, and judgment aforesaid, and during the proceedings in the above entitled cause in said District Court, error has intervened to his prejudice, and his defendant here assigns the following errors, to-wit:

1. The Court erred in not holding that this petitioner and appellant is wrongfully held and illegally imprisoned, and in dismissing his petition and remanding him into custody, of the Marshal of the Southern District of New York. The Court erred in not holding that this petitioner is held and imprisoned without due process of law and in violation of the Constitution of the United States and the 5th amendment of the Constitution of the United States.

2. The Court erred in dismissing the petition for habeas corpus and remanding appellant into custody.

3. The Court erred in not holding and finding that the arrest of your petitioner while he was enroute to Washington as defendant in a criminal case there being actually tried against him by the [fol. 43] United States, was illegal and void and in violation of the

Constitution of the United States and the due process clause of the said Constitution.

4. The Court erred in not holding and finding that your petitioner was immune from arrest in the Southern District of New York at the time when he was passing through said District en route to his trial in the City of Washington, District of Columbia.

5. The Court erred in not holding and finding that your petitioner while enlarged in bail in the District of Columbia and being actually on trial there, was at the said time immune and privileged from arrest in the Southern District of New York.

By reason whereof, this petitioner and appellant prays that said judgment may be reversed and that he be ordered discharged.

July 10, 1924.

Nash Rockwood, Attorney for Petitioner and Appellant.

[fol. 44] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed July 18, 1924

And now comes Benjamin W. Morse and respectfully represents that on the 26th day of June, 1924, a judgment was entered by this Court dismissing his petition for habeas corpus, and remanding him to the custody of a Marshal of the Southern District of New York.

And your petitioner respectfully shows that in said record proceedings and judgment in this cause lately pending against your petitioner manifest errors have intervened to the prejudice and injury of your petitioner, all of which will appear more in detail in the assignment of error which is filed with this petition.

Therefore, your petitioner prays that an appeal may be allowed him from said judgment to the Supreme Court of the United States, and that said appeal may be made a supersedeas upon the filing of a bond to be fixed by the Court; that the petitioner may be admitted to bail pending the determination of the appeal in the said Court.

July 10, 1924.

Benjamin W. Morse, by Nash Rockwood, Attorney for Petitioner.

[fol. 45] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 18, 1924

On reading of the petition of Benjamin W. Morse, for appeal and consideration of the assignment of errors presented therewith, it is

Ordered that the appeal as prayed for be and is herewith allowed.

And it appearing to the Court that a citation was duly served as provided by law, it is

Ordered that petition be admitted to bail pending the final determination of this appeal in the sum of $5,000. The appeal to operate as a supersedeas until the further order of this Court, unless it shall appear to the Court that the perfection and argument of said appeal have been unduly delayed. If not promptly perfected and argued the said Appellee may move upon five days' notice to the Appellant for the vacation of said supersedeas.

Cost bond on appeal is hereby fixed in the sum of $100.

Further ordered upon consent of counsel in open court that this order be entered nunc pro tunc as of July 10, 1924.

Francis A. Winslow, U. S. D. J.

[File endorsement omitted.]

[fols. 46 & 47] CITATION—In usual form, showing service on Wm. Hayward; filed July 18, 1924; omitted in printing

[fol. 48] [File endorsement omitted.]

[fol. 49] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION EXTENDING TIME

It is hereby stipulated, that the time of the appellant to comply with citation, and cause record on appeal herein to be filed in the office of the Clerk of the United States Supreme Court, be extended up to and including August 20th, 1924.

Dated New York, August 5th, 1924.

Wm. Hayward, U. S. Attorney, Attorney for the Appellee.
Nash Rockwood, Attorney for Appellant.

So Ordered: Alex. Gilchrist, Jr., Clerk.

[fol. 50] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City New York, in the Southern District of New York this nineteenth day of August, in the year of our one thousand nine hundred and twenty-four, and of the Independence of the said United States the one hundred and forty-ninth.

Alex. Gilchrist, Jr., Clerk. (Seal of District Court of the United States, Southern District of New York.)

Endorsed on cover: File No. 30,562. S. New York D. C. U. S. Term No. 597. Benjamin W. Morse, appellant, vs. The United States of America. Filed August 20, 1924. File No. 30,562.

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

No. [illegible]

HARRY F. [illegible], APPELLANT,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF [illegible]

[illegible]

(30,563)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 598

HARRY F. MORSE, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 4, 1924

[fol. 1] **IN UNITED STATES DISTRICT COURT**

PETITION FOR WRIT OF HABEAS CORPUS—Filed Feb. 6, 1923

To the Honorable the District Court of the United States in and for the Southern District of New York:

The petition of Harry F. Morse, respectfully shows that he is a resident of Noank, State of Connecticut, and is now actually imprisoned and restrained of his liberty and detained by power of the authority of the United States in the custody of the United States Marshal for the above named district by reason of the fact and circumstances, and not otherwise. Except as is hereinafter stated, your petitioner is not committed or detained by virtue of any process or mandate issued by any Court of the United States, or by any Judge thereof; nor is he committed or detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or the final order of such tribunal made in a special proceeding instituted for any cause except to punish him for contempt; nor by virtue of an execution or other process issued upon such a judgment, decree or final order. The cause or pretense of the imprisonment or restraint, according to the best of the knowledge and belief of your Petitioner, is that Petitioner was arrested, apprehended and taken into custody in the Southern District of New York, on February 6, 1923, by said Marshal by virtue of an alleged warrant issued out of the above named court based upon an alleged indictment against your Petitioner and others said to have been found by the Grand Jury in said Court in the Southern District of New York on April 27, [fol. 2] 1922; your Petitioner further states, upon information and belief, that said indictment is invalid and does not state a crime, and does not state facts sufficient to constitute a crime, and that the validity of said indictment has been passed upon by the United States District Court for the District of Connecticut, in the case of United States against Harry F. Morse, and that it was held and decided by said court that said indictment was invalid and it was so declared by order of said court. A copy of said order and the opinion filed therewith is attached hereto marked Exhibit "A" and made a part hereof.

Wherefore your Petition- prays that a writ of habeas corpus issue directed to the said Marshal commanding him to produce Petitioner before this Honorable Court, together with the true cause of the detention of Petitioner to the end that inquiry may be had in the premises; and Petitioner respectfully requests that he may be permitted on the hearing of said writ to submit such further affidavits and documents as he may be advised in support of his said application and that pending the hearing and determination upon said writ that

Petitioner be admitted to bail under said writ in such reasonable amount as to the Court may seem proper.

Dated, the 6th day of February, 1923.

Harry F. Morse. Nash Rockwood, Charles Tressler Lark, Attorneys for Petitioner.

Office and Post Office Address, 527 Fifth Avenue, Borough of Manhattan, New York, N. Y.

[fol. 3] Jurat showing the foregoing was duly sworn to by Harry F. Morse, omitted in printing.

[File endorsement omitted.]

[fol. 4] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Writ of Habeas Corpus Requiring the United States Marshal to produce the Body of Harry F. Morse

RETURN TO WRIT OF HABEAS CORPUS—Filed March 10, 1923

William C. Hecht, United States Marshal for the Southern District of New York, respectfully makes the following return to the writ of habeas corpus herein:

First. Respondent alleges that the petition for the writ of habeas corpus herein is insufficient in that it does not state any facts sufficient to authorize the issuance of such writ.

Second. The grand jurors of the United States of America for the Southern District of New York did present to the United States District Court for the said District an indictment against the same Harry F. Morse and others and the said indictment was duly filed in this Court on April 27, 1922.

Third. That thereafter, to wit, on May 10, 1922, a bench warrant was issued out of this Court upon the said indictment for the apprehension of the said defendants.

Fourth. That the defendant Harry F. Morse was taken into custody in the Southern District of New York in pursuance of said aforesaid bench warrant and was detained by me under authority thereto.

[fol. 5] Fifth. On information and belief, thereafter on February 6, 1923, the defendant was duly arraigned before the United States District Court in the said Southern District of New York and a plea of not guilty was entered to the aforesaid indictment and bail in the sum of $15,000 was fixed pending trial upon the said indictment, which bail was not furnished by the said Harry F. Morse.

Wherefore, your respondent prays that the writ of habeas corpus herein may be dismissed and that the said Harry F. Morse be remanded to the custody of the United States Marshal for the Southern District of New York to be dealt with according to law.

William C. Hecht.

Jurat showing the foregoing was duly sworn to by Wm. C. Hecht, omitted in printing.

[File endorsement omitted.]

[fol. 6] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HARRY F. MORSE

STATE OF NEW YORK,
County of New York, ss:

Harry F. Morse, being duly sworn, says:

I submit the following affidavit in support of my application by writ of habeas corpus, verified February 6th, 1923, and to vacate and set aside my said arrest, and as a traverse and reply to the "return to writ of habeas corpus," filed herein on the 17th day of February, 1923, by William C. Hecht, United States Marshal for the Southern District of New York, and in accordance with the provisions of the revised statutes of the United States, I suggest to the Court the facts herein contained in addition to the averments in my petition for said writ of habeas corpus, in support of my contention that my arrest and detention by the United States Marshal for the Southern District of New York, as set forth in said writ of habeas corpus, was wholly illegal, unauthorized, without warrant of law, a violation of my constitutional rights, and that I was arrested and detained without jurisdiction or proper authority.

[fol. 7] In January, 1922, two indictments were returned against me, in connection with others, by a Grand Jury in the District of Columbia. The first indictment, known as Criminal Indictment No. 38753, was returned by a Grand Jury in the Supreme Court of the District of Columbia and is entitled "United States v. Charles W. Morse, Erwin A. Morse, Harry F. Morse, (this deponent) Benjamin W. Morse, George M. Burditt, Nehemiah H. Campbell, Rupert M. Much, Philip Reinhardt, Leonard D. Christie, William W. Scott, Richard O. White and Colin H. Livingstone." In said indictment I am charged, in connection with said other defendants, with having committed the crime of conspiracy to defraud the United States and to commit an offense against the United States by defrauding the United States Shipping Board Emergency Fleet Corporation, as provided by Section 37 of the Federal Code. The second of said indictments is known as Criminal No. 39033, and was returned by a

Grand Jury in the Supreme Court of the District of Columbia in January, 1922, and is entitled "United States v. Charles W. Morse, Erwin A. Morse, Harry F. Morse, (this deponent) Benjamin W. Morse, George M. Burditt, Nehemiah H. Campbell, Rupert M. Much, Philip Reinhardt, Leonard D. Christie, William W. Scott, Richard O. White and Colin H. Livingstone." I am charged in connection with said other defendants in said indictment, with having committed the crime of conspiracy to defraud the United States, as pro-
[fol. 8] vided by Section 37 of the said Federal Penal Code. I was arraigned upon both of said indictments, pleaded not guilty to each thereof, and was admitted to bail on each indictment in the sum of $10,000. I furnished bonds in said amounts, with George Ray, a resident of Washington, D. C. as my surety. My said bonds were duly approved by the Court and I was ordered by the Court to be released from the custody of the Marshal and was thereupon placed in the legal custody of my bondsman. Said bonds have at all times been in full force and effect since said time, and were in full force and effect at the time of my arrest herein in the Southern District of New York, on the 6th day of February, 1923, and I was at said time and am now in the legal custody of my said bondsman in said Washington, criminal cases.

Said criminal cases in the District of Columbia were at issue and had been peremptorily set for trial in the Supreme Court in said District of Columbia, by Justice Wendell P. Stafford, for 10:30 A. M. of February 6th, 1923, and all defendants were directed by the Court to appear at said time for trial.

I reside at New London, Conn., and in order to attend said trial at Washington on February 6th, 1923, I left New London on February 5th, 1923, by the Federal Express of the New York, New Haven & Hartford Railroad Company, which was the usual and shortest and most direct railroad route to Washington, D. C. As I was en route to Washington on said train and asleep in my berth thereon, I was forceably seized by the United States Marshal at New York City, as said Federal Express passed through New York City, and was forceably taken from the train at the Pennsylvania Station, and sub-
[fol. 9] jected to said arrest by said Marshal, from which I seek to be discharged herein upon the ground that the same was and is wholly illegal, unauthorized, and in violation of my constitutional rights. I inquired of the representatives of said Marshal at the time of my said arrest by what authority I was taken into custody, and he thereupon exhibited to me a bench warrant issued upon an indictment found against me in April, 1922, in the Southern District of New York, which is hereafter referred to, which said bench warrant was dated July, 1922. I was taken by said Marshal and his assistants from said train to the Federal Building in New York City, notwithstanding the fact that I explained in detail and at length to the said Marshal and his assistants that I was on my way to attend the trial of my criminal cases at Washington on the morning of February 6th, 1923, in Justice Stafford's court. I requested permission to telephone to my counsel, Nash Rockwood, who was at the Willard Hotel, at Washington, D. C., awaiting the calling of my

said case on the morning of February 6th, and was refused permission to do so by said Marshal and his assistants, and I was told that I could not communicate with my said counsel. I was detained against my will in the office of the Marshal in the Federal Building, on said day, from about two o'clock in the morning of February 6th until I was thereafter and during the afternoon of February 6th released by order of United States Judge Winslow, upon my application for a habeas corpus, and upon my furnishing bail approved by the Court in the sum of $15,000. By reason of said arrest and de- [fol. 10] tention I was wholly unable to proceed with my journey to Washington, and when my case was called before Justice Stafford on the morning of February 6th, at 10:30 A. M., I was unable to be present in court.

In April, 1922, I was also indicted by a Grand Jury in the Southern District of New York, charged with having committed the crime of conspiracy to defraud the United States and to violate Section 37 of the Penal Code, and Section 215 of the Penal Code by using the mails to defraud, in the matter of the sale of stock of the United States Steamship Company. A bench warrant was issued upon said indictment, which was the same bench warrant upon which I was arrested on February 6th, 1923, as hereinbefore detailed. Said bench warrant was sent to the United States Attorney in the State of Connecticut, and proceedings under the United States Revised Statutes to remove me from my place of residence in the State of Connecticut to the Southern District of New York were instituted by the United States in Connecticut in July, 1922, before U. S. Commissioner Lavery. Such proceedings were there had that I was held by the Commissioner *fro* removal to the Southern District of New York, and was committed to the Marshal pending application for a warrant of removal to the United States Judge of the District. I immediately applied by writ of habeas corpus and certiorari for my discharge, and the United States, at the same time, applied to Hon. Edwin S. Thomas, United States Judge, for a warrant for my removal. Pending the decision of said applications, [fol. 11] I was released upon bail, and during all of said times my bail in the District of Columbia was, as aforesaid, in full force and effect.

Said proceedings upon the application of the Government for my removal to the Southern District of New York and my application for a discharge upon writ of habeas corpus and certiorari were consolidated and heard together, and after a full consideration of both applications, and on January 25th, 1923, Judge Edwin S. Thomas, United States Judge for the District of Connecticut, granted my application for discharge upon writ of habeas corpus, and denied the Government's application to remove me to the Southern District of New York. Judge Thomas at said time had full jurisdiction of the subject matter and of my presence under the provisions of Section 1014 of the Revised Statutes of the United States. I annex hereto and make a part of this affidavit, the same as if herein written at length, a copy of the opinion of Judge Thomas granting my said discharge and denying the right of the United States to remove me

to the Southern District of New York. The order of Judge Thomas so discharging me and denying the right of the United States to remove me to the Southern District of New York had not been appealed from by the United States at the time of my said arrest on February 6th, 1923.

In the argument of the United States Attorney and of my counsel before Judge Thomas, the United States Attorney urged that [fol. 12] the indictment charged the commission of a criminal offense under the Federal Laws, and was legally sufficient as an indictment, and was prima facie evidence of probable cause. The question of the legal sufficiency of the indictment was therefore squarely and directly before Judge Thomas for decision, and was submitted to him both by the Government and by my counsel. Judge Thomas held, in his opinion which is submitted herewith, that the said indictment in the Southern District of New York, upon which I have now been arrested in New York as hereinbefore detailed, did not charge the commission of a criminal offense against the laws of the United States and that upon the facts of the case as shown before the Commissioner probable cause to believe me guilty of a criminal offense against the United States was not made out by the Government.

At the time of my arrest in the Southern District of New York, the proceedings in Connecticut before United States Judge Thomas had fully terminated, and I had been and was discharged from the custody of the United States in Connecticut, and my bond in said proceedings in Connecticut was fully exonerated and it had been determined that the United States was without legal right or authority to remove me to the Southern District of New York for trial upon the illegal indictment aforesaid. On the 6th day of February, 1923, when I was arrested herein, as aforesaid, I was in the sole legal custody of my bondsman upon the indictments found in the Washington jurisdiction.

The United States of America was the complainant against me both in the New York and the Washington jurisdictions.

[fol. 13] The consent of the Court in Washington, nor the consent of Judge Wendell P. Stafford, before whom my trial was set for February 6th, as aforesaid, was not asked or obtained for my arrest and detention in New York, or for my removal to the Southern District of New York.

My brother, Benjamin W. Morse, was likewise indicted with me in Washington and New York, and had also given bail in Washington, was subjected to removal proceedings in Massachusetts seeking to remove him from the State of Massachusetts, the place of his residence, to the Southern District of New York. The said removal proceedings which were instituted by the United States in Boston, before United States Commissioner Hon. William A. Hayes 2nd, were pending undetermined on February 6th, 1923, and on February 8th, 1923, my said brother, Benjamin W. Morse, was discharged by said United States Commissioner Hayes, whose decision was as follows:

"This is to certify that I, William A. Hayes, 2nd, United States Commissioner for the District of Massachusetts, have on this 8th day of February, 1923, found that the evidence submitted by the defendant is sufficient to overcome the presumption of the Indictment, and that I have, therefore, discharged the defendant.

(Signed) William A. Hayes, 2nd, United States Commissioner." (Seal.)

By virtue of the said decision of said Commissioner in Boston, my said brother was fully discharged from custody in Massachusetts and his bond exonerated.

I submit to this honorable Court that my arrest in the Southern District of New York was a violation of my constitutional rights under [fol. 14] the due process clause of the Constitution of the United States, and an illegal deprivation of my liberty, for the reason, among others, that the same operated to prevent my attendance in Washington on February 6th, 1923, when my criminal cases were set for trial, thereby rendering liable to forfeiture the bond which I had given in the Washington jurisdiction.

I further submit that inasmuch as I had been discharged by United States Judge Thomas in the District of Connecticut in proceedings wherein said Judge had jurisdiction both of my person and of the subject matter, said decision was final and conclusive upon the United States until reversed upon appeal.

I further submit that the indictment found against me in the Southern District of New York was and is wholly illegal and does not charge an offense under Federal Statutes, and did not warrant my arrest or detention, as aforesaid, and that there was an entire absence of weight or jurisdiction thereunder to authorize the restraint of my personal or the deprivation of my liberty.

I further claim and submit that the said indictment so returned against me was illegally found, for the reason that there was improperly and illegally present before the Grand Jury which returned said indictment an unauthorized person, to-wit, one Fletcher Dobyns, who appeared before the Grand Jury pursuant to an apparent authority given to him by Hon. Harry M. Daugherty, Attorney General of the United States, purporting to appoint said Dobyns as a special assistant to the Attorney General, with authority to appear before the said Grand Jury. The letters so appointing the said Dobyns are [fol. 15] filed with the Clerk of this Court, and are as follows:

"CBS-VHB. November 21, 1921.

Fletcher Dobyns, Esq., Special Counsel U. S. Shipping Board, Washington, D. C.

SIR: In connection with the investigation and prosecution of alleged violations of sections 35, 37, 47, 46, and 48 of the Criminal Code of the United States, Section 41 of the Act of September, 1916, as amended by the Act of July 15, 1918, and of other provisions of law in the District of Columbia, the Eastern District of Virginia,

the Eastern District of Pennsylvania, the Southern District of New York, the Districts of Maryland, Connecticut and Massachusetts, and other judicial districts, by certain corporations, to-wit:

The Virginia Shipbuilding Corporation,
The Groton Iron Works,
The United States Steamship Company,
The Binghamton Steamship Company,
The Huron Steamship Company,
The St. Paul Steamship Company,
United States Ship Corporation,
Steamship Operating Company,
Hudson Navigation Company,
United States Transport Company,
Minneapolis Steamship Company,
C. W. Morse & Company,
Travellers Steamship Company,
Traders Steamship Company,
Transfer Steamship Company, and
United States Transport, Import and Export Company,

and by individuals acting in behalf of said corporations as officers, directors, employees, agents and attorneys, in connection with the construction of shipyards and their appurtenances in certain of said districts, the construction of ships for, and the operation thereof by, the United States Shipping Board Emergency Fleet Corporation, and the presentation of claims to the same, and to the United States, growing out of such transactions, you are hereby appointed a Special Assistant Attorney General and are authorized and directed, as such Special Assistant to the Attorney General, to conduct, in any of said districts, and in any other district, any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct.

[fol. 16] You are to receive no compensation other than that received by you as Special Counsel, United States Shipping Board.

Respectfully, (Signed) H. M. Daugherty, Attorney General."

"CBS. April 1, 1922.

Fletcher Dobyns, Esq., Special Counsel U. S. Shipping Board, E. F. C., 45 Broadway (Room 521), New York City.

SIR: In connection with the investigation and prosecution of alleged violations of Section 37, 215 and 216 of the Criminal Code of the United States and of other provisions of law, in the Southern District of New York, and in other judicial districts by the following named persons, to-wit:

Charles W. Morse, Erwin A. Morse, B. W. Morse, Harry F. Morse, B. Murray, George M. Burditt, R. M. Much, Nehemiah Campbell, R. O. White, Martin J. Gillen, Stuart Gibboney, William A. Barber, James A. Lynch, Mark L. Gilbert, G. S. Foster, H. E. Boughton, W. Sheridan Kane, William Dennis, James O'Brian, Jams B. Nel-

son, Arthur Kohler, Lawrence Bremer, Maurice O. Purdy, Arthur Braun, Edward Lucas, Harvey A. Willis, A. U. Rodney, J. D. Sugarman, Frank Epps, E. M. Fuller, L. L. Winkelman, Frank Batman, E. H. McHenry, A. J. Krebs, Jr., Samuel D. Disbrowk, George J. Strong, Dexter Rood, Jr., William Guggenheim, B. C. Higley, by persons doing business under the firm names of Slattery & Co., Jones & Baker and Schmidt & Baery, and by other persons concerned in the conduct of the business and the sale of the capital stock of the following named concerns, to-wit:

United States Steamship Company,
Frederik Steamship Company,
Bedford Steamship Company,
Newport Steamship Company,
Northland Steamship Company,
Owego Steamship Company,
Chemung Steamship Company,
J. G. McCullough Steamship Company,
Lansing Steamship Company,
[fol. 17] Wm. Castle Rhodes Steamship Company,
Fong Suey Steamship Company,
Binghamton Steamship Company,
Minnesota Steamship Company,
Huron Steamship Company,
St. Paul Steamship Company,
Steamship Operating Company,
United States Transport, Import and Export Company,
United States Transport Company, Inc.,
Hudson Navigation Company,
Groton Iron Works,
Virginia Shipbuilding Corporation, formerly American Shipbuilding Corporation,
United States Ship Corporation,
United States Steamship Company of Delaware (proposed),
C. W. Morse & Company, Incorporated,
Robert Palmer & Sons Shipbuilding & Marine Railway Co.,
Woodlaw Corporation of Saratoga (Morse Park, Inc.),
General Realty Co.,
New York-Knickerbocker Real Estate Co.,
New York, Albany & Troy Transportation Co.,
Albany River Trust Co.,
Morse Securities Co.,
New York & Buffalo Steamship Co.,
New York, Norfolk & Washington Steamship Co.,
Gunston Hall Steamship Co.,
Betsey Bell Steamship Company,
Venada Steamship Co.,
H. F. Morse Steamship Co.,
E. A. Morse Steamship Co.,
Clemens C. Morse Steamship Co.,

Jennie R. Morse Steamship Co.,
Anna E. Morse Steamship Co.,
Colin H. Livingstone Steamship Co.
Georgie M. Morse Steamship Co.,
Follard Steamship Co.,
Nameang Steamship Co.,
Worcester Steamship Co.,
Quinnipine Steamship Co.,
Merry Mount Steamship Co.,
Hartford Steamship Co.,
Honnedaga Steamship Co.,
Provincetown Steamship Co., and
Hopatcong Steamship Co.;

You are hereby authorized and directed as Special Assistant to the Attorney General, to conduct, in any of the said districts, any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct.

You are to serve without compensation other than received by you as Special Counsel, United States Shipping Board.

Respectfully, (Signed) Guy D. Goff, Acting Attorney-General."

[fol. 18] At the date of said letter the said Dobyns was and ever since has been Special Counsel of the United States Shipping Board and United States Shipping Board Emergency Fleet Corporation (hereinafter called the Fleet Corporation). Said Fleet Corporation is a private business corporation organized and existing under the laws of the District of Columbia. At the date of said letter he was not and never since has been an officer of the Department of Justice. At the date of said letter the said Dobyns was not and never has since been compensated or agreed to be compensated by the Department of Justice or from any appropriation made for the Department of Justice or any subdivision thereof or for expenditure under the direction of the Attorney General of the United States in the conduct of his duties as head or in the conduct of the work of the Department of Justice. For his services in conducting said proceedings before the grand jury which resulted in the indictment herein, the said Dobyns was to be compensated and theretofore was agreed to be compensated, as I am informed and believe, exclusively out of funds of the Shipping Board and Fleet Corporation; and I am informed and believe that prior to the date of said letter said Dobyns was acting, and ever since July 29, 1921, up to a comparatively recent time he has acted exclusively under the authority, direction and control of the Fleet Corporation or of the United States Shipping Board (hereinafter in this affidavit called the "Shipping Board") and not under the control or direction of the Attorney General.

[fol. 19] Fletcher Dobyns, Esq., is and ever since on or about July 29, 1921, has been one of the Attorneys for the Shipping Board and Fleet Corporation. He is not now and never during that period has

been an officer of the Department of Justice. Upon information and belief he is and during all of said period has been compensated for his services by the Shipping Board and Fleet Corporation. He is not and has not been or agreed to be compensated by the Department of Justice or any subdivision there. There is no provision of law under which Mr. Dobyns is or was authorized to be appointed specially or otherwise without compensation or while an attorney of the Fleet Corporation to conduct grand jury trials. Section 3 of the Merchants Marine Act of 1920 does not authorize an attorney employed pursuant thereto to conduct such proceedings. The pretended appointment or designation of Mr. Dobyns by the Attorney-General of the United States, of which a copy is set forth herein, was not in pursuance of or in compliance with the Act of Congress of July 30, 1906 (34 United States Statutes at large, page 816). I am informed and believe that neither his said so-called letter of appointment by the Department of Justice, nor a certified copy thereof, nor any oath thereunder, nor his appointment or employment as an attorney of the Shipping Board or Fleet Corporation, nor a certified copy thereof, nor any oath thereunder, has been filed in this Court. Mr. Dobyns was in charge of the grand jury proceedings which resulted in the indictment in the Southern District of New York. He appeared before such grand jury, not as a witness, but in control of and during the presentation to the grand jury of the evi-[fol. 20] dence on which the indictment herein was found. He is not nor during any of the times herein mentioned has he been United States attorney or a member of the staff of the United States Attorney for the Southern District of New York.

The proceedings before, and the submission of evidence to, the grand jury which resulted in and on which the indictment herein is based were, at the instance of and solely under the direction and control of the Fleet Corporation, or the Shipping Board; such proceedings were not, as required by law, conducted by, or under the control of the United States Attorney for the Southern District of New York or any member of his staff, and were not conducted by any attorney or counsellor authorized or appointed, therefore, under any provision of law, nor were they specifically directed by the Attorney General of the United States.

In a motion heretofore filed in the Southern District of New York by defendants jointly indicted with deponent, seeking to set aside and quash the said indictment because the said Fletcher Dobyns appeared before the grand jury in the Southern District of New York, the said Fletcher Dobyns filed his affidavit dated May 18, 1922, in the course of which said Fletcher Dobyns deposed as follows:

"Southern District of New York, ss:

Fletcher Dobyns, being first duly sworn, on his oath, deposes and says on or about the 29th day of July, 1921, I was appointed Special Counsel for the United States Shipping Board Emergency Fleet Corporation to investigate the transactions on Charles W. Morse and his associates with said Fleet Corporation. As a result of an exhaustive investigation, I reached the conclusion, that Mr. Morse and his as-

sociates have been guilty of violating certain sections of the Criminal Code of the United States and laid the matter before the Attorney General of the United States. Thereupon the Attorney General requested me to present the evidence which I had obtained to a grand jury, or grand juries, as the circumstances might require. He then addressed to me the following letter (setting out letter of November [fol. 21] 21, 1921, purporting to appoint the said Fletcher Dobyns as Special Assistant to the Attorney General). On the 29th day of November, 1921, I executed and filed in the Department of Justice the following oath:

'I, Fletcher Dobyns, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office of Special Assistant to the Attorney General of the United States on which I am about to enter, so help me God.'

(Signed) Fletcher Dobyns.

'Subscribed and sworn to before me this 29th day of November, A. D., 1921. J. Pierson Jones, Notary Public.' (Seal.)

* * * * * * *

"During the investigation and presentation of this case to the grand jury I have received instructions and advice from the Attorney General and his assistants and have not received instructions or advice from the Fleet Corporation or from anyone else."

I did not learn until February 7th, 1923 that the statements so made by Mr. Dobyns as to the sources and extent of his authority to appear before said grand jury in New York and the grand jury in the District of Columbia, resulting in indictments against me in both jurisdictions, was fully disputed by the Hon. Harry M. Daugherty, Attorney General of the United States. There has just been brought to my attention, and we have just obtained a printed book issued by the Government Printing Office, Washington, D. C., entitled, "Charges of Hon. Oscar E. Keller against the Attorney General of the United States" and containing at length in 573 printed pages the hearings before the Committee on the Judiciary in the House of Representatives, extending from November 16, 1922, and concluding on December 21, 1922, in the matter of the charges of the said Keller against the said Attorney General.

Specification No. 9 of the said charges against the said Attorney General printed at length on page 58 of the said printed book spe- [fol. 22] cifically charges that the said Harry M. Daugherty, as Attorney General of the United States:

"Did prostitute his high office for purpose of personal vengeance seeking and obtaining an indictment of the said Morse and of his sons as directors of the Virginia Shipbuilding Corporation on a charge of having violated the Federal Statutes; that at the same time

the said Harry M. Daugherty obtained the indictment of three attorneys said to have advised the company in connection with the alleged illegal acts but failed, neglected and refused to seek indictments of other directors of the company equally guilty of the alleged violation of the Federal Statute, if any, and also failed to seek the indictment of another attorney—equally guilty with the attorneys, indicted, the said principal attorney being holder of a position of great responsibility and trust in the office of the Attorney General."

The answer of the Attorney General to this specification was as follows (p. 59 of the printed book):

"The Attorney General begs leave to inform your Honorable Committee that the connection of the Department of Justice with the so-called Morse indictment was wholly formal and in proof thereof alleges and states to your Committee as follows:

That the facts and circumstances justifying the return of the indictment in question arose out of certain transactions which Mr. Morse and his co-defendants had with the United States Shipping Board subsequent to the entry of the United States into the World War; that the United States Shipping Board had and maintained its own legal department, and as such, investigated the facts giving rise to such indictments; that while it is true that certain of the attorneys representing the United States Shipping Board bore the title of Special Assistant to the Attorney General without pay they were at no time subject to the direction and control of the Department of Justice, and, in fact, were never directed or controlled by the Department of Justice, but were subject solely to the direction and control of the United States Shipping Board and those charged with the administration of its legal affairs. The Attorney General did not direct that any person, a director or otherwise, should, or should not, be indicted, but left that matter to the officials in charge of the investigation."

In the same printed book, at p. 547 thereof, appears the testimony of Colonel Guy D. Goff, who was the Acting Attorney General who signed an order of appointment of Fletcher Dobyns as Special Assist- [fol. 23] ant to the *to the* Attorney General, dated April 21, 1922, subsequent to the finding of the indictments in the jurisdiction of the District of Columbia, hereinbefore referred to. Colonel Goff testified, among other things, as follows:

"Mr. Howland: Mr. Goff, may I ask your attention to specification No. 9, on page 46 of the facts?

Mr. Classon: What is that?

Mr. Howland: I say specification No. 9 in the committee proof, page 46, and in the hearings——

Mr. Classon: Well, we don't care about that; we have the committee print.

Mr. Goff: It is on page 47.

Mr. Howland: Yes, in the committee print page 47. That refers to the Virginia Shipbuilding Corporation and the charge attempted

to be made is that a certain man by the name of Morse was indicted because of some previous relation which he sustained with the Attorney General of the United States. What is the situation in reference to that so-called Morse indictment, Mr. Goff, as you are informed on the subject?

Mr. Goff: The so-called Morse indictment grew out of certain transactions which Mr. Morse had with the United States Shipping Board Emergency Fleet Corporation. These transactions were reported to the Department of Justice by the legal department of the United States Shipping Board for such action as the Department of Justice might conclude was warranted in the premises. In due course the papers were sent to the District Attorney whose district had jurisdiction. This case was sent to the United States Attorney for the District of Columbia. I was present on two several occasions when the Attorney General stated to the general counsel of the United States Shipping Board that the Department of Justice did not care to have anything to do with this prosecution and that inasmuch as the United States Shipping Board had a very large and experienced staff of lawyers that the Attorney General, would prefer that all matters connected with the Virginia Shipbuilding Corporation, one of Mr. Morse's corporations, and with Mr. Morse, his sons, and others, be conducted solely by the legal staff of the United States Shipping Board in conjunction with Major Peyton Gordon, the United States District Attorney for the District of Columbia. That was so understood, and to my knowledge, so far as my knowledge goes, the Attorney General gave no directions to these attorneys as to what they should do.

[fol. 24] Mr. Morse at one time during the absence of the Attorney General in the West on official business went abroad and the Department of Justice was requested to use its good offices with the State Department to have Mr. Morse intercepted and asked to return to this country. I, personally, took the matter up with the State Department in conjunction with Mr. Schlessinger, the general counsel of the United States Shipping Board. The Attorney General himself personally knew nothing of these proceedings and, in fact, was not in the District of Columbia at the time they occurred. As a result the French authorities intercepted Mr. Morse when the Paris landed at Havre and he was returned to the United States as an undesirable citizen to the French Government. Shortly thereafter Mr. Fletcher Dobyns, an attorney of Chicago, Illinois, and a member of the local staff of the United States Shipping Board, who had sole charge of the Morse matter applied to the Department of Justice for authority to appear before the United States Grand Jury. Such authority could, of course, be given him only by appointing him a special assistant to the Attorney General of the United States, charging him with the responsibility of prosecuting this case. He was appointed as the Special Assistant Attorney General of the United States and was appointed without pay because he was already on the salary list of the United States Shipping Board. I think as to that, although I may be mistaken, I signed his appointment as Acting Attorney General; and he went to the office of the United States District Attorney here

and presented with the United States District Attorney the issues involved in the so-called Morse indictment to the grand jury. I could say, if an opinion be permissible, that I do not think the Attorney General of the United States either suggested or indicated, or controlled, directly or indirectly, or otherwise, the presentation of this case, or the names of the others who should be presented to the grand jury for indictment.

Mr. Foster: And the indictment grew out of an investigation of the same nature of the matter by the so-called Walsh Committee?

Mr. Goff: Yes, sir.

Mr. Foster: Which investigated Morse's different companies through a period of two years?

Mr. Goff: They furnished the basis of the investigations.

Mr. Foster: Report of which is filed in the House?

Mr. Goff: Yes, sir."

Until I read the printed book containing the Keller charges from [fol. 25] which I have given quotations above, I had no knowledge whatever that the proceedings before the Grand Jury of the District of Columbia resulting in my indictment, including the appearance of Mr. Fletcher Dobyns before the Grand Jury, were not directed and controlled by the Attorney General of the United States. I did not know that the appointment of Fletcher Dobyns as Special Assistant to the Attorney General was purely formal, nor did I know that Mr. Dobyns had sought such appointment as the representation of the Shipping Board or the Fleet Corporation. I am advised by my counsel, and verily believe that the appearance of Mr. Fletcher Dobyns before the Grand Jury, and his activities therein resulting in my indictment were, and are, wholly illegal and constituted the presence before said Grand Jury of an unauthorized person in direct violation of law, and in violation of my constitutional rights; and I am making this affidavit at the earliest opportunity.

I believe that my inclusion as defendant in the indictment herein was procured by Flecher Dobyns, Esq., as Special Counsel of the United States Shipping Board Emergency Fleet Corporation through the abuse and misuse of the process of this court in the manner aforesaid in that said Fletcher Dobyns appeared before said grand jurors in the Southern District of New York and presented evidence, examined witnesses, and discussed said case resulting in the indictment found against me in the Southern District of New York, as aforesaid. The appearance and the participation in the proceedings before said Grand Jury in the Southern District of New York, by the said Fletcher Dobyns, as aforesaid, was, as I charge the fact to be, without authority and contrary to the laws of the United States, in that the [fol. 26] said Fletcher Dobyns was not "thereunto specifically directed" by the Attorney General of the United States, and was not present in said grand jury room pursuant to any appointment by the Attorney General of the United States under any provision of law of the United States and the appearance and the participation of said Fletcher Dobyns in the proceedings before said Grand Jury were, and constitute, an abdication by the Attorney General and by

the Department of Justice of the United States of his, or its, duties and functions under the laws of the United States, and an attempt by the Fleet Corporation to assume and exercise such duties and functions of the Attorney General and of the Department of Justice without authority of law, and through an attorney of the Fleet Corporation to institute and conduct the prosecution herein including the conduct of the grand jury proceedings which resulted in the indictment herein to the great prejudice, and in violation, of my rights and of the rights of each and every defendant herein.

In the quotations hereinbefore given from the so-called Keller charges and the reply of the Attorney General thereto, when the Attorney General refers to the so-called Morse indictments, he means and intends to refer to the indictment in this case against this deponent, together with other indictments now pending in the Southern District of New York; when the Attorney General speaks in said answer of certain of the attorneys of the United States Shipping Board who bore the title of special assistants to the Attorney General without pay, he means and intends to refer among others to the said Fletcher Dobyns; when the Attorney General states in said [fol. 27] answer that said Special Assistants to the Attorney General were at no time subject to the direction and control of the Department of Justice, and, in fact, were never controlled or directed by the Department of Justice, but were subject solely to the direction and control of the United States Shipping Board and those charged with the administration of its legal affairs, he means and intends to refer to the said Fletcher Dobyns and to his conduct in connection with the finding of the indictment in this present case, and he means and intends that neither he, the Attorney General, nor the Department of Justice, ever directed or controlled the said Fletcher Dobyns, specifically and otherwise; when the Attorney General states in his said answer that the connection of the Department of Justice with the so-called Morse indictment was solely formal, he means, and intends to say, that the connection of the Attorney General and of his assistants with the present indictment was altogether formal and that he had no actual direction of, or control over, the proceedings leading to said indictment, but that the same were left solely to the said Fletcher Dobyns who was not under the direction or control of the said Attorney General.

I further aver upon information and belief as aforesaid that it now appears from this evidence so recently discovered that the said Fletcher Dobyns was not directed specifically, or otherwise, by the Attorney General of the United States to conduct the said Grand Jury proceedings which resulted in the finding of the indictment in this case.

This affidavit is in support of an application to the Court to vacate [fol. 28] the order of arrest by habeas corpus herein upon the ground, among others, that the indictment was found under the direction of the said Fletcher Dobyns, who was not specifically, or otherwise, directed by the Attorney General to conduct the Grand Jury proceedings herein, and that his appearance before the Grand Jury in the Southern District of New York was wholly unauthorized and

contrary to law and rendered illegal and void any indictment so returned by said Grand Jury, including the indictment found against this deponent, in which he was arrested in the Southern District of New York on the 6th day of February, 1923, as aforesaid.

I further submit that being in the legal custody of my said Washington bondsman, and on my way to attend the trial of my case, as aforesaid, I was immune and privileged from arrest while I was passing through the Southern District of New York to attend court, as aforesaid, in the District of Columbia.

I further specifically reply to the return of the Marshal as follows:

(a) In reply to the first paragraph of the said return I affirm that the said petition for writ of habeas corpus herein was sufficient to authorize the issuance of the writ, and, furthermore, that the additional facts herein stated support and justify the same under the act of February 5, 1867, Ch. 28, 14 Stat. L. 385, which reads as follows:

"The Petitioner or party imprisoned or restrained may deny any of the facts set forth in the return or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended by leave of the court or justice or judge before or after the same are filed, so that thereby the material facts may be ascertained."

And I aver and state the fact to be that the additional facts herein [fol. 29] stated and the suggestions herein contained were and are made by leave of the Court, specifically granted, when this matter came on for argument on the 17th day of February, 1923, before Hon. Francis S. Winslow, United States Judge.

(b) I deny that the indictment found against me by a Grand Jury of the United States of America for the Southern District of New York, as set forth in the second paragraph of the return of said Marshal, was properly found or that the same constituted a legal or valid indictment against me and I aver that the same was and is illegal for the reasons hereinbefore set out.

(c) I admit that a bench warrant was issued out of this Court, as stated in the paragraph marked three of the return of said Marshal for my apprehension, and I aver the fact to be that upon said bench warrant I was arrested for removal in the District of Connecticut and was discharged from said arrest and said removal denied by Hon. Edwin S. Thomas, United States Judge, as hereinbefore set out.

I admit that I was taken into custody in the Southern District of New York, but I deny that said bench warrant or any process issued upon the indictment found against me in the Southern District of New York was sufficient or legal authority for my detention or arrest, and I deny that the same conferred any authority or right

upon the Marshal of the Southern District of New York to detain me or restrain me of my liberty.

[fol. 30] d. I deny that I was "duly arraigned" before the United States District Court in the Southern District of New York on the 6th day of February, 1923, and I aver that I was brought before said Court entirely against my will and in violation of my constitutional rights and in violation of the due process clause of the Constitution of the United States. I deny that I entered any plea whatsoever at the time of said pretended arraignment, and I deny that bail in the sum of $15,000 was fixed pending my trial upon the said indictment, and I aver the fact to be that my bail of $15,000 was given upon my application to be discharged by virtue of a writ of habeas corpus.

(e) I aver that I was and am detained and restrained of my liberty wholly in violation of my constitutional and legal rights and by virtue of illegal process and that the same constitutes an abuse of process and an unlawful restraint of my liberty, wholly without jurisdiction or authority therefor.

Wherefore the petitioner, Harry F. Morse, prays this Honorable Court that the writ of habeas corpus herein may be sustained and that my arrest and detention may be vacated and set aside, and that I be discharged from custody or detention, and that my bail be exonerated and discharged and that the entire proceedings resulting in the restraint of my liberty be declared to have been improper, illegal and in violation of my constitutional rights as guaranteed to me by the Constitution of the United States and the amendments [fol. 31] thereto.

This affidavit is filed with the express permission of the Court.

Harry F. Morse.

Sworn to before me, this 23rd day of February, 1923. Carrie L. Edgar, Notary Public. My Commission expires Feb. 1st, 1928. (Seal.)

[fol. 32] Jurat showing the foregoing was duly sworn to by Harry F. Morse omitted in printing.

[fol. 33] EXHIBIT "A" TO AFFIDAVIT OF HARRY F. MORSE

UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT

UNITED STATES

vs.

HARRY F. MORSE

Edward L. Smith, Esq., Hartford, Conn., for United States.
Nash Rockwood, Esq., and Charles Tressler Lark, Esq., New York City, and Carl Foster, Esq., Bridgeport, Conn., for Defendant.

THOMAS, D. J.:

This matter is before the Court on a writ of habeas corpus resisting the removal of the defendant from the District of Connecticut to the Southern District of New York.

The defendant was apprehended in the State of Connecticut, where he resides, and taken before a United States Commissioner upon a complaint verified by the United States Attorney for this District charging him with a violation of Section 37 of the Penal Code. Attached to the complaint, or information, which was upon information and belief only, was a certified copy of an indictment returned against the defendant and twenty-three others by a Grand Jury in the Southern District of New York in April, 1922, accusing them of conspiring to use the mails to defraud.

Removal of the defendant from Connecticut to the Southern District of New York for trial was sought in the proceedings before the Commissioner. At the preliminary hearing, after motions to dismiss had been made and denied, the Government offered in evidence [fol. 34] a certified copy of the indictment together with testimony identifying the defendant and thereupon rested its case without further proof. The defendant then moved for dismissal alleging that the indictment was fundamentally defective and that the local Connecticut practice had not been followed as required by Section 1412 of the Federal Code. (R. S. §1014.) This motion was denied and the defendant presented oral and documentary evidence to the Commissioner to rebut the presumption of probable cause, which testimony was taken at great length. At its conclusion the Commissioner denied further motions to dismiss and reserved decision, subsequently finding that there was probable cause to believe the defendant guilty of the crime charged and committing him for removal to the custody of the Marshal. Application for writs of habeas corpus and certiorari were made and granted in behalf of the defendant who was admitted to bail pending decision.

The Marshal has made return to the writ of habeas corpus alleging that he is holding the defendant pursuant to the order of commitment of the Commissioner and the Commissioner has made return to this Court of all of his proceedings including the evidence taken before him.

The Defendant has demurred to the returns of the Marshal and Commissioner averring an entire lack of jurisdiction in the proceedings and an absence of probable cause.

Prior to the argument upon the return of the writs of habeas corpus and certiorari the United States Attorney made an oral request for an order for the removal of the defendant to the Southern District of New York and by consent of counsel, with the approval of the Court, all motions were argued and will be considered and decided together.

The practice upon applications of this character is governed by [fol. 35] section 1412 of the Federal Code (R. S. 1014) which reads, so far as is here applicable:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. * * *

* * * * * * *

And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the Judge of the district where such offender or witness is imprisoned, seasonable to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

At the very outset, it is urged for the defendant that the proceedings before the Commissioner were not conducted "agreeably to the usual mode of process against offenders" in criminal cases in the State of Connecticut in that (a), the accused was not confronted with the witnesses against him,—(b), that the counsel for the Government was himself a witness for the complainant in testifying to the identification of the defendant, and (c), that counsel in his summation to the Commissioner improperly commented upon the fact that the defendant had not taken the stand as a witness in his own behalf. In support of these contentions, reference is made to State v. Ferrone, 96 Conn. 160; State v. Ferrone, 97 Conn. 258; Nanos, et al. v. Harrison, 117 Atl. Rep. 803; Section 6634, General Statutes of Conn.

That the local state practice is to be followed in removal proceed- [fol. 36] ings before a U. S. Commissioner under R. S. 1014 quoted supra, is established by numerous decisions, In U. S. v. Rurcede, 220 Fed. 210 the Court sustained a writ of habeas corpus and discharged the defendant because the preliminary removal proceedings before the Commissioner did not conform to the practice established

in New York by the Code of Criminal procedure for proceedings before a magistrate and cited in support of the conclusion reached, U. S. v. Greene, 100 Fed. 941, where the Court, Judge Addison Brown, following the opinion of Mr. Justice Curtis of the Supreme Court of the United States in U. S. v. Rundlett, 2 Curt. 41, Fed. Cases No. 16, 208, held that it was the effect of Section 1014 to assimilate all proceedings for holding accused prisoners to answer before a court of the United States to proceedings had for similar purposes by laws of the State where the proceedings might take place. In Hastings v. Murphie, 219 Fed. 83 a similar rule was invoked in Massachusetts, and a recent decision in point is U. S. v. Maresca, 266 Fed. 713, at page 721.

In Safford v. U. S. 252 Fed. 471, Judge Ward, speaking for the Circuit Court of Appeals for this Circuit, said, page 473:

"The defendant contends that the language 'agreeably to the usual mode of process against the offenders in such states' means only 'the process itself, such as warrants, commitments, etc., as distinguished from procedure, which may embrace hearings.' We think it means procedure, and the Code of Criminal Procedure of the State of New York (sections 188-220) provides for just such examination. United States v. Dunbar, 83 Fed. 151; Cohen v. United States, 214 Fed. 25; United States v. Greene, 100 Fed. 941."

We have in Connecticut no code of criminal procedure but follow the common law. The defendant offered in evidence and proved by a former Judge of the City Court of Bridgeport who had acted [fol. 37] as such for twelve years, and a former City Attorney in the same Court, who had been such for almost fifteen years, that the procedure in Connecticut called for more than the information and identification on a plea of not guilty before the State established a prima facie case. It was conclusively shown that that State must produce witnesses to make out its prima facie case, and that the Court would review all of the evidence offered, whether it was offered by the State or the defendant, to determine whether there was sufficient evidence to justify the finding of the existence of probable cause to hold the accused for the Superior Court. It further appeared that if the State offers in evidence the information and proves the identity of the accused and then rests, offering no oral testimony, that the defendant is entitled to a discharge.

While attaching substantial importance to these contentions they are, nevertheless, overshadowed by the more vital contentions of the non-existence of jurisdiction and probable cause, upon the affirmative determination of which must ultimately rest the Government's right of removal.

The indictment was prima facie evidence of the existence of probable cause, but that it was not conclusive is decided in Hastings v. Murchie, 219 Fed. 83, at page 88, Beavers v. Henkel, 194 U. S. 24; U. S. v. Yount, 267 Fed. 861; Tinsely v. Treat, 205 U. S. 20; Gayon v. McCarthy, 252 U. S. 171, 173.

In Beavers v. Henkel, Mr. Justice Brewer said, on page 85:

"It is sufficient for this case to decide, as we do, that the indictment is prima facie evidence of the existence of probable cause. This is not in conflict with the views expressed by this Court in Greene v. Henkel, 183 U. S. 249."

In the Yount case, supra, Judge Thompson said, page 862:

[fol. 38] "The Supreme Court has mapped out with clearness the procedure under section 1014 of the Revised Statutes (Comp. St. Sec. 1674), where it is sought to remove a defendant from the district where arrested to that where the offense is triable. It is distinctly ruled that, while the indictment constitutes prima facie evidence of probable cause, it is not conclusive, and evidence may be offered by the defendant tending to show that no offense triable in the district to which removal is sought has been committed; that in such a proceeding the function of the judge is not ministerial but judicial."

If the indictment does not charge the commission of a penal offense under the laws of the United States, then all jurisdiction to commit the defendant for removal is at an end. Tinsely v. Treat, supra, was evidently intended by the Supreme Court to prescribe a general rule of procedure governing matters of this character. There the matter came before the Supreme Court because the Commissioner and Court would not allow the defendant to offer evidence to rebut the presumption of the existence of probable cause. On page 28, Chief Justice Fuller, writing the opinion, said:

"At the hearing before the Circuit Court, in addition to the record of the proceedings before the District Judge, an offer was made to prove by witnesses the facts set forth in the petition, but the court did not admit the same, because it was held that the certified copy of the indictment, with proof of the identity of the party accused, sufficiently established the existence of probable cause.

In other words, the indictment was in effect held to be conclusive. The Circuit Judge said, it is true, that probable cause must be shown in order to obtain a removal, but he held that inasmuch as the copy of the indictment alone was regarded as sufficient evidence of probable cause in Beavers v. Henkel, 194 U. S. 73, it was sufficient in the present case. In that case, however, no evidence was introduced to cover the prima facie case made by the indictment except that evidence was offered as to what passed in the grand jury room and rejected on that ground and not because it went to the merits."

Then in commenting on Sec. 1014, the learned Chief Justice spoke as follows, page 29:

[fol. 39] "Obviously the first part of this section provides for the arrest of any offender against the United States wherever found and without reference to whether he has been indicted, but when he has

been indicted in a District in another State than the District of arrest, then, after the offender has been committed, it becomes the duty of the District Judge, on inquiry, to issue a warrant of removal. And it has been repeatedly held that in such cases the judge exercised something more than a mere ministerial function, involving no judicial discretion. He must look into the indictment to ascertain whether an offense against the United States is charged, find whether there was probable cause, and determine whether the court to which the accused is sought to be removed has jurisdiction of the same, 'The liberty of the citizen, and his general right to be tried in a tribunal or forum of his domicile, imposes upon the judge the duty of considering and passing upon those questions.' Mr. Justice Jackson, then Circuit Judge, Greene's case, 52 Fed. Rep. 104. In the language of Mr. Justice Brewer, delivering the opinion in Beavers v. Henkel, 194 U. S. 73; 83;

It may be conceded that no such removal should be summarily and arbitrarily made. There are risks and burdens attending it which ought not be needlessly cast upon any individual. These may not be serious in a removal from New York to Brooklyn, but might be if the removal was from San Francisco to New York. And statutory provisions must be interpreted in the light of all that may be done under them. We must never forget that in all controversies, civil or criminal, between the Government and an individual the latter is entitled to reasonable protection. Such seems to have been the purpose of Congress in enacting section 1014, Rev. Stat., which requires that the order of removal be issued by the judge of the district in which the defendant is arrested. In other words, the removal is made a judicial, rather than a mere ministerial act."

And again on page 31, the Court, in a general review of the cases, took occasion to say:

[fol. 40] "It was held in Beavers v. Henkel, 194 U. S. 73; Benson v. Henkel, 198 U. S. 1; Hyde v. Shine, 199 U. S. 62, as well as Greene v. Henkel, supra, that an indictment constituted prima facie evidence of probable cause, but not that it was conclusive.

We regard that question as specifically presented in the present case and we hold that the indictment cannot be treated as conclusive under section 1014."

In general it may be said that the policy of the law is to protect the individual against any invasion of the rights, one of the most important of which is to be immune from criminal prosecution if not legally accused. In a long line of federal decisions the indictment in removal proceedings while admittedly prima facie evidence of the existence of probable cause is given only the effect and strength of an affidavit or information. As illustrative of the current of judicial authority upon this proposition may be cited, In re Dana, 68 Fed. 886; U. S. v. Greene, 100 Fed. 941; U. S. v. Campbell, 179 Fed. 762.

Upon the demurrer of some of the defendants in the instant case, the indictment was upheld in the Southern District of New York as being "in usual form," but upon a careful consideration and analysis of it I cannot reach the same conclusion and cannot believe that the objections which have been argued in behalf of the defendant in this jurisdiction were called to the attention of the Court in the Southern District of New York. The indictment divides the twenty-four indicted defendants into the classes designated as sixteen "principal defendants" and eight "other defendants." Clause B states that the alleged scheme to defraud was to be devised by the sixteen "principal defendants" alone, and the "other defendants," according to Clause A were to aid, abet and counsel the "principal defendants" in "accomplishing the object of the conspiracy." The [fol. 41] indictment, therefore, clearly specifies two classes of defendants engaged in different acts but with a common purpose and is thus brought within the condemnation of Wilson v. U. S. 190 Fed. 428, where Judge Noyes, speaking for the Circuit Court of Appeals, said, page 436:

"We do not question the correctness of the proposition stated in behalf of said defendant that when certain persons combine to perform certain acts and some of them combine with others engaged in totally different acts, though all may have a similar general purpose in view, it is error to join them in an indictment."

Furthermore, Clause D, in terms limits the making of the fraudulent representations and the dissipation and conversion of assets to the principal defendants.

Again, while there is an allegation that the U. S. Steamship Company controlled the business and affairs of the several corporations referred to in the indictment as the "underlying corporations," there is an entire absence of averment that the "principal defendants" controlled either the stock ownership or the Board of Directors of the U. S. Steamship Company, or that it would have been possible for them to have wasted, dissipated, or converted the assets of the U. S. Steamship Company. There is a general allegation that the "principal defendants" were "actively engaged as officers, directors, attorneys, agents and employees, in the conduct and management of the business and affairs of the U. S. Steamship Company," but no allegation that they directly or indirectly controlled the corporate acts of the United States Steamship Company.

As the indictment is for conspiracy to use the United States mails to defraud, the intention to commit the offense prohibited by Section 215 of the Penal Code must be averred and under the decision of the Supreme Court in U. S. v. Young, 232 U. S. 155, there is grave [fol. 42] doubt if such intention is sufficiently alleged.

In the consideration of this application for removal where the indictment is to be treated as an affidavit, the overt acts must show that they were committed in furtherance of the principal offense charged. Anderson v. U. S. 260 Fed. 557; U. S. v. Dowling, 278 Fed. 630; and it should be averred therein that the letters or matter

deposited in the mails were "to be sent or delivered by the Post Office establishment of the United States." Tested by these rules it seems to me that all of the overt acts relating to mailing are clearly defective as none of these overt acts contain any allegation that the matter mailed or deposited in the Post Office was "to be sent or delivered by the Post Office establishment of the United States." As to overt acts numbered 2, 3, 4, 5, 8, 9, 10, 11, 12, 21, 22, 23, 24, 25 and 26, it is not even alleged that the matter mailed was stamped so that the machinery of the United States Post Office department would be legally set in motion. As to overt acts numbered 7-19 and 20, which contain averments that United States postage stamps were affixed to the matter mailed, there is no allegation that said postage was legally sufficient in amount, which although a somewhat technical omission, is, nevertheless, indicative of the lack of care and precision in the drawing of the indictment, particularly in the allegations respecting the overt acts.

And further,—the defendants are not directly charged with having conspired to violate Sec. 215 of the Penal Code, but the charge is that they conspired

"to commit divers, to-wit, one thousand offenses against the United States, of the kind under the circumstances, in the manner and by the means and methods following, that is to say:"

[fol. 43] Then follows the general allegations as to the connection of the "principal defendants" with the United States Steamship Company and the underlying corporations; that the "other defendants" aided, abetted and counselled the "principal defendants"; that the "principal defendants" were to devise a scheme to defraud; that all of the defendants were to engage in the mailing of one thousand letters and papers for the purpose of executing a fraudulent scheme and that the "principal defendants" were to make certain fraudulent representations in order to induce the public to buy the shares of the United States Steamship Company. Other alleged fraudulent acts of the "principal defendants" are also averred. The conspiracy to mail one thousand letters of a fraudulent character would not constitute a criminal act under Section 215 without the previous formation of a scheme or artifice to defraud. Had the indictment charged directly the formation of a conspiracy to commit an offense against the United States by violating Section 215 of the Penal Code, a different case would be presented. In the respect last mentioned the indictment is ambiguous and involved and, if not a fatal defect, does not clearly apprise the defendants of the offense which they are called upon to meet. An indictment should charge a criminal offense in unmistakable terms, free from doubt, and not resting upon inference. The general rules pertinent here are well summarized by Judge Clayton in U. S. v. Dowling, supra. At page 633 he said:

"The settled rules governing here are that a crime should not be charged by way of inference, but directly: the indictment should set forth accurately every ingredient of which the offense is com-

posed; if the crime is made up of acts and intent, these must be [fol. 44] set forth forth with reasonable particularity as to the time and place; the accused should be informed by the indictment as to the precise nature of the charge against him, to enable the court to say as to whether the facts set forth are sufficient in law to support a conviction; and the test is whether the indictment contains every element of the offense and sufficiently informs the defendant of what he must meet, and also whether it will enable him to sustain a plea of former acquit-al or conviction." Citing cases.

For all of the reasons stated the conclusion seems imperative that the indictment does not charge the defendants with a violation of the criminal law of the United States.

But wholly aside from the legal insufficiencies of the indictment, I find that its evidentiary force as prima facie proof of the existence of probable cause herein, was overcome by the evidence offered in behalf of the defendant. It must be remembered that the Government's whole case consisted of the introduction of the indictment and proof as to the identity of this defendant. There the Government rested. This established a prima facie case in the absence of other evidence. Thereupon the defendant offered in evidence the testimony of witnesses to rebut the existence of the prima facie case and that testimony covers some three hundred pages of evidence. At the conclusion of that testimony the Government offered no evidence to refute the testimony offered in behalf of the defendant or to disprove any part of it.

The indictment rests principally upon allegations to the general effect that the conspiracy contemplated a defrauding of the public by inducing the purchase of stock in the United States Steamship Company through the fraudulent representations that the underlying corporations were

[fol. 45] "respectively going concerns owning very valuable ships and shipbuilding properties, and having valuable contracts for the construction, repair and operation of ships and the carrying of freight; that these contracts would bring great sums of money in earnings and dividends to owners and holders of the capital stock of said underlying companies, including said United States Steamship Company, and that the value of said shares of said underlying corporations would thereby be greatly enhanced; which said pretenses, so to be made by said principal defendants to said persons to be defrauded would be false and fraudulent, etc."

The testimony offered in behalf of the defendant before the Commissioner shows that all of these allegations, if made, were true and well founded and that the averments of the indictment relative to fraudulent representations are based upon an assumption of facts wholly contrary to the fact, at least, so far as the evidence adduced shows. The United States Steamship Company and all of its subsidiary companies were by the evidence shown to have not only been going concerns, but all of the underlying corporations were

the owners and operators of valuable properties. At Groton in this District, was located the extensive plant of the Groton Iron Works representing an investment of some millions of dollars and employing a large force of laborers, mechanics and shipbuilders, actually engaged in the construction of ships for the Government. A court will take judicial notice of the files in civil cases pending in its own Court. There is in fact, pending in this District, an action at law brought by the Trustee in Bankruptcy of the Groton Iron Works to recover from the United States Shipping Board Emergency Fleet Corporation a sum alleged to be due the plaintiff of some millions of dollars, and an extended argument on the pleadings of that case, already had, shows that there was, in fact, certain contracts of [fol. 46] magnitude executed between the Groton Iron Works and the Fleet Corporation. And the evidence before the Commissioner also showed that at Alexandria, Virginia, there was the costly shipbuilding plant of the Virginia Shipbuilding Company also engaged in Government work and with thousands of operators and employees. The evidence also shows that the Hudson Navigation Company was the owner and operator of valuable ships upon the Hudson River with terminals at New York and Albany and a large capital investment. That the United States Transport Company had not been incorporated at the time of the formation of the alleged conspiracy, although it is otherwise alleged in the indictment. The evidence further shows that the Groton and Virginia Companies had existing contracts with the Government for the construction of freight ships exceeding the sum of thirty million dollars. The United States Transport Company had large freight contracts with shippers both in this and foreign jurisdictions. So that in any view of the evidence adduced it could not be successfully urged before a trial jury that the United States Steamship Company, the Groton Iron Works, the Virginia Shipbuilding Corporation, the United States Transport Company, and The Hudson Navigation Company were not going concerns,—that they did not own valuable properties,—that their contracts with the Government for the construction of ships were not of considerable prospective value,—that their freight carrying contracts were not of present and future value, and that there did not exist valid business reasons upon which to base the belief and statement that the earnings of these companies from existing contracts and prospective profits would justify the declaration [fol. 47] of dividends. Furthermore the evidence refutes the allegations in the indictment to the effect that the "principal defendants" had been guilty of fraudulent misconduct in conducting the affairs of the business of the United States Steamship Company or of the underlying corporations. The salaries paid to the defendants seem to have been reasonable and within the power of the corporation to authorize. The evidence negatives the suggestion that the assets of the various corporations were wasted or dissipated by the defendants and the letter sent out to stockholders by the defendant Rupert M. Much, who was President of the United States Steamship Company, instead of containing mis-statements of fact

to delude and defraud prospective purchasers of stock, seems to have been a frank and candid statement of the financial and physical condition of the Company. The defendants seem to have been justified in their belief that the Government contracts would yield substantial profits. The companies were all prosperous, going concerns and there was nothing to indicate that future difficulties would be encountered in the matter of the Government contracts or that there would be any litigation concerning them resulting in the financial embarrassment of the corporation and the consequent depreciation in the value of their respective properties and capital stock. If the allegations in the indictment concerning fraudulent representations do not rest upon any facts, they become and are mere naked conclusions and cannot be made the basis of a criminal prosecution.

Probable cause, in a removal proceeding must mean more than mere inference or suspicion. It must contemplate well founded judicial belief in the guilt of the accused or that there is at least some valid reason upon which to base a belief in criminality. The removal of one accused of crime from the jurisdiction of his domicile [fol. 48] to another jurisdiction for trial calls for a discriminating degree of judicial discretion. As has been noted, the order of removal is not a ministerial act. It is a judicial act. If the indictment obviously asserts as facts matters which did not or could not have existed and such appears from evidence, or if it rests upon the mere conclusion of the pleader, it is ineffective as proof of the evidence of probable cause.

The burden of proof was upon the defendant to overcome the prima facie case established for the Government by the indictment and proof of identity, and when this has been done by the affirmative proof, as here, the burden then shifted and was upon the Government which elected, however, to stand upon the indictment and the identity without the presentation of any evidence whatever in rebuttal. The case, then comes before me with the Government's contentions, upon the facts, successfully controverted sufficiently so to negative the existence of probable cause.

As the Government's application for removal and the defendant's motion for discharge by habeas corpus were, by consent, consolidated and have been heard together I have reached the conclusion that on this record there is no probable cause to believe the defendant guilty of the crime attempted to be charged in the indictment.

For all the reasons herein stated the application for a warrant of removal to the Southern District of New York is denied and the defendant's application for discharge upon habeas corpus is granted and his bond released.

The writ must be sustained and the defendant discharged, and it is So ordered.

January 25, 1923

[fol. 49] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION

Appearances: Rockwood & Lark, (Nash Rockwood of Counsel) Attorneys for Petitioners; William Hayward, United States Attorney (John E. Joyce, Assistant United States Attorney), for the Government.

WINSLOW, D. J.:

The petitioners seek release by habeas corpus from the custody of the United States Marshal for the Southern District of New York. They were arrested on February 6, 1923, within this district, by the Marshal upon a warrant issued out of this court July 19, 1922 directed to said Marshal. The indictment on which the warrant was issued was filed herein April 27, 1922. It charges the petitioners and twenty-two others with conspiring to use the mails in a scheme to defraud. The petitions on which the writs were issued urge that their restraint is illegal because the indictment is invalid, and does not state facts sufficient to constitute a crime.

[fol. 50] The return sets forth the finding and filing of the indictment and the issuance of the bench warrant. The petitioners traverse the return and set forth additional grounds of attack, in substance:

(1) That the petitioners, at the time of their arrest in this district, were en route to the District of Columbia to attend the trial of an indictment pending against them and others in that district;

(2) That the decision of the District Judge in the District of Connecticut, petitioners' home district, in removal proceedings brought to secure the removal of the petitioner, Harry F. Morse, from that district to the Southern District of New York, was to the effect that the indictment was invalid and insufficient;

(3) That an unauthorized person was in attendance before the Grand Jury which returned the indictment in this district.

The material facts necessary to a decision are not disputed. There are questions of law, however, requiring consideration.

The petitioners contend that they were immune from this particular arrest for the reason that, when apprehended, they were en route through this district to the District of Columbia, there to answer another indictment and attend their own trial in that jurisdiction. The defendants, at the time of their arrest on the train, were under indictment returned in this district charging them with a felony. They were arrested by a duly authorized officer of the United States acting pursuant to a warrant duly issued out of this Court.

It is a common law rule that suitors and witnesses while going

to, attending at and returning from Court are exempt from civil process. 5 Corpus Juris, 565; Larned v. Griffin 12 Fed. 590. The [fol. 51] reason for this rule has been generally recognized as the desire of the Courts to induce suitors to present their controversies for determination and to protect them from being subjected to service of process in a civil suit which could not otherwise reach them, except for their presence in the jurisdiction for the purpose of attending to the particular controversy. This immunity, under the common law rule, does not, however, extend to one while in custody under criminal process or while attending or returning from his trial on a criminal charge. 3 Cyc. 923.

The petitioners are not privileged from criminal arrest while passing through this jurisdiction to attend a criminal trial, nor yet were they privileged from civil process, even in the District of Columbia or in this jurisdiction, while en route for the purpose indicated. The common law rule is intended to protect suitors voluntarily coming into and going from the jurisdiction.

Scott v. Curtis, 27 Vt. 762.
Netograph v. Scrugen, 197 N. Y. 277, 381.
Ex parte Levi, 28 Fed. 651.

The next question to be considered is the contention of the petitioners that this Court could not or should not assume jurisdiction of the petitioners because they were obligated to appear in the District of Columbia to stand trial on indictments there pending. This contention is without merit. While it is true that it is a well recognized rule of comity that where two Courts have concurrent jurisdiction of the same subject matter, the one which first assumes such jurisdiction holds it to the exclusion of the other until such jurisdiction is exhausted,—that rule has no application to criminal process [fol. 52] where the defendant is accused of different crimes in different jurisdictions. The Supreme Court of the District of Columbia has jurisdiction of certain offenses committed within its territory and, presumptively, these defendants were en route to answer the charges in that jurisdiction. In like manner, this Court has jurisdiction of certain offenses committed within its territorial limits and this crime, for which the petitioners are indicted as it appears from the record, is separate and distinct from the crime charged in the District of Columbia. The Court of neither jurisdiction can restrain the other from proceeding on the respective indictments. The petitioners, pending the determination of the applications herein, were admitted to bail and thereby they were free to come and go, only bound to appear in the jurisdictions when required.

Peckham v. Henkel, 216 U. S. 482.
Ex parte Marrin, 164 Fed. 631.

The only remaining question to be considered is the contention of the petitioners that in certain removal proceedings in the District of Connecticut, on the pending indictments, removal to this district was refused on various grounds. Neither the sufficiency of the in-

dictment nor the regularity of the proceedings before the Grand Jury are proper matters of inquiry on habeas corpus.

Ex parte Parks, 93 U. S. 18.
Ex parte Siebold, 100 U. S. 371.
Collins v. Loisel, 262 U. S. 427.

The petitions and writs of habeas corpus will be dismissed.

Francis A. Winslow, U. S. District Judge.

June 19, 1924.

[fol. 53] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DISMISSING WRIT OF HABEAS CORPUS—Filed June 26, 1924

The writ of habeas corpus heretofore allowed to the above named Harry F. Morse having duly come on to be heard before the Hon. Francis A. Winslow, District Judge, at a term of this Court, held on the 26th day of June, 1924, and after hearing Nash Rockwood, of counsel for petitioner, in support of said writ, and John E. Joyce, Esq., Assistant to the United States Attorney, in opposition thereto, and due deliberation having been had thereon, on motion of William Hayward, United States Attorney, it is

Ordered that said writ be and the same hereby is dismissed, and it is

Further ordered, that the said Harry F. Morse surrender himself into the custody of the United States Marshal for the Southern District of New York on or before the 10th day of July, 1924.

Enter.

Francis A. Winslow, United States District Judge.

[File endorsement omitted.]

[fol. 54] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 18, 1924

And now comes Harry F. Morse, by Nash Rockwood, his attorney, and in connection with his petition for an appeal, says that in the record and proceedings, and judgment aforesaid, and during the proceedings in the above entitled cause in said District Court, error has intervened to his prejudice, and this defendant here assigns the following errors, to-wit:

1. The Court erred in not holding that this petitioner and appellant is wrongfully held and illegally imprisoned, and in dismissing

his petition and remanding him into custody, of the Marshal of the Southern District of New York. The Court erred in not holding that this petitioner is held and imprisoned without due process of law and in violation of the Constitution of the United States and the 5th amendment of the Constitution of the United States.

2. The Court erred in dismissing the petition for habeas corpus and remanding appellant into custody.

3. The Court erred in not holding and finding that the arrest of your petitioner while he was en route to Washington as defendant in a criminal case there being actually tried against him by the [fol. 55] United States, was illegal and void and in violation of the Constitution of the United States and the due process clause of the said Constitution.

4. The Court erred in not holding and finding that your petitioner was immune from arrest in the Southern District of New York at the time when he was passing through said District en route to his trial in the City of Washington, District of Columbia.

5. The Court erred in not holding and finding that your petitioner while enlarged in bail in the District of Columbia and being actually on trial there, was at the said time immune and privileged from arrest in the Southern District of New York.

By reason whereof, this petitioner and appellant prays that said judgment may be reversed and that he be ordered discharged.

July 10, 1924.

Nash Rockwood, Attorney for Petitioner and Appellant.

[File endorsement omitted.]

[fol. 56] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed July 18, 1924

And now comes Harry F. Morse and respectfully represents that on the 26th day of June, 1924, a judgment was entered by this Court dismissing his petition for habeas corpus, and remanding him to the custody of a Marshal of the Southern District of New York.

And your petitioner respectfully shows that in said record proceedings and judgment in this cause lately pending against your petitioner manifest errors have intervened to the prejudice and injury of your petitioner, all of which will appear more in detail in the assignment of error which is filed with this petition.

Therefore, your petitioner prays that an appeal may be allowed him from said judgment to the Supreme Court of the United States,

and that said appeal may be made a supersedeas upon the filing of a bond to be fixed by the Court; that the petitioner may be admitted to bail pending the determination of the appeal in the said Court.

July 10, 1924.

Harry F. Morse, by Nash Rockwood, Attorney for Petitioner.

[File endorsement omitted.]

[fol. 57] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 18, 1924

On reading of the petition of Harry F. Morse, for appeal and consideration of the assignment of errors presented therewith, it is

Ordered that the appeal as prayed for be and is herewith allowed.

And it appearing to the Court that a citation was duly served as provided by law, it is

Ordered that petitioner be admitted to bail pending the final determination of this appeal in the sum of $5,000. The appeal to operate as a supersedeas until the further order of this Court, unless it shall appear to the Court that the perfection and argument of said appeal have been unduly delayed. If not promptly perfected and argued the said Appellee may move upon five days' notice to the Appellant for the vacation of said supersedeas.

Cost bond on appeal is hereby fixed in the sum of $100.

Further ordered upon consent of counsel in open court that this order be entered nunc pro tunc as of July 10, 1924.

Francis A. Winslow, U. S. D. J.

[File endorsement omitted.]

[fols. 58 & 59] CITATION—In usual form, showing service on Wm. Hayward; filed July 18, 1924; omitted in printing

[fol. 60] [File endorsement omitted.]

[fol. 61] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION EXTENDING TIME

It is hereby stipulated, that the time of the appellant to comply with citation, and cause record on appeal herein to be filed in the

office of the Clerk of the United States Supreme Court, be extended up to and including August 20th, 1924.

Dated New York, August 5th, 1924.

Wm. Hayward, U. S. Attorney, Attorney for the Appellee.
Nash Rockwood, Attorney for Appellant.

So Ordered: Alex. Gilchrist, Jr., Clerk.

[fol. 62] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York this nineteenth day of August, in the year of our Lord one thousand nine hundred and twenty-four, and of the Independence of the said United States the one hundred and forty-ninth.

Alex. Gilchrist, Jr., Clerk. (Seal of District Court of the United States, Southern District of New York.)

Endorsed on cover: File No. 30,563. S. New York D. C. U. S. Term No. 598. Harry F. Morse, appellant, vs. The United States of America. Filed August 20, 1924. File No. 30,563.

APPELLANTS

BRIEF

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 597.

BENJAMIN W. MORSE, APPELLANT,

vs.

THE UNITED STATES OF AMERICA.

Appeal by Benjamin W. Morse from Judgment of the District Court of the United States for the Southern District of New York, Entered June 26, 1924, Dismissing His Application for Release by Habeas Corpus and Remanding Him to the Custody of the Marshal of the Southern District of New York.

BRIEF FOR APPELLANT.

NASH ROCKWOOD,
Attorney for the Defendant, Benjamin W. Morse, 527 Fifth Avenue, Borough of Manhattan, New York City.

CHARLES T. LARK,
Of Counsel.

DECEMBER 1, 1924.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

INDEX.

CASES CITED.

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BRIEF FOR APPELLANT.

Statement of Procedure.

On February 6, 1923, while *en route* through New York from his residence in Massachusetts to attend his trial upon criminal charges pending against him in the Supreme Court of the District of Columbia, the appellant was forcibly re-

moved from the train at New York City by the marshal of the Southern District of New York, acting under authority of a bench warrant issued upon an indictment found in said District charging the appellant with the crime of conspiracy.

Appellant, contending that his arrest was illegal, applied for and procured a writ of *habeas corpus* and demanded immediate discharge from custody.

The marshal of the Southern District of New York filed a return to the writ, averring, in substance, that the arrest was made by virtue of a bench warrant issued upon an indictment filed in the Court on April 27, 1922 (fols. 4-6).

With the permission of the Court, the appellant filed an additional affidavit in support of his application for discharge and as a traverse and reply to the return of the marshal, verified February 23, 1923 (fols. 6-32), the appellant was produced before Hon. Francis A. Winslow, United States District Judge for the Southern District of New York, and admitted to bail pending the determination of his application by *habeas corpus,* in the sum of fifteen thousand dollars ($15,000), which was furnished. Judge Winslow subsequently, on July 19, 1924, dismissed the writ of *habeas corpus* (fols. 53-54) and filed an opinion (fols. 49-53). The appellant filed five assignments of error, averring that his arrest and detention was in violation of his rights under the Constitution of the United States and the due process clause of the Constitution (fols. 54-56), and presented his petition for appeal to the Supreme Court of the United States (fols. 56-57), which was allowed (fols. 57-61), citation served, appeal to this Court duly perfected, and bail fixed upon appeal in the sum of five thousand dollars ($5,000), the appeal to operate as a supersedeas until the further order of the District Court.

Statement of Facts.

The facts are undisputed and are substantially as follows:

In January, 1922, the appellant was indicted by two separate indictments in the Supreme Court of the District of Columbia charged with having conspired to defraud the United States and to commit offenses against the United States in the matter of the alleged cheating and defrauding of the Fleet Corporation. The defendant was arraigned in the District of Columbia, pleaded not guilty, and, after the disposition of preliminary motions, admitted to bail and the trial of the indictments upon the merits was *peremptorily* set by Hon. Wendell P. Stafford, Justice of the Supreme Court of the District of Columbia, for trial in the said Supreme Court at 10 o'clock a. m. on February 6, 1923.

In April, 1922, the defendant was also indicted by a Federal grand jury in the Southern District of New York charged with having conspired to violate the provisions of Section 37 and Section 215 of the Federal Penal Code in the alleged fraudulent use of the United States mails. At the time of the indictment in New York a codefendant, Harry F. Morse (also appellant here in case No. 598), was in Connecticut, where he resided, and the appellant Benjamin W. Morse was in the State of Massachusetts, where he resided. The Government instituted removal proceedings under Section 1014 of the Revised Statutes in both the Massachusetts and Connecticut jurisdictions to remove the said respective defendants to New York for trial.

In Connecticut, removal proceedings for the removal to New York of Harry F. Morse were instituted before a United States Commissioner, who, after hearing oral testimony

comprising several hundred typewritten pages of testimony and much documentary evidence, decided in favor of the Government and ordered the appellant Harry F. Morse committed to the custody of the marshal for removal. Upon this hearing the Government introduced evidence and cross-examined witnesses. The said Harry F. Morse thereupon applied for a writ of *habeas corpus* to Hon. Edwin S. Thomas, United States Judge in the District of Connecticut, and the United States applied for a warrant of removal. By agreement of counsel, both proceedings in Connecticut—that is, the removal proceedings and the *habeas corpus* proceedings—were consolidated and heard together, and United States Judge Thomas, after a full hearing and examination of the evidence taken before the United States Commissioner, in an opinion held that the New York indictment did not charge the defendant Harry F. Morse (appellant in case No. 598) with the commission of a criminal offense under the United States laws; that there was no probable cause to believe the said defendant, Harry F. Morse, guilty of the commission of a crime; that the Commissioner had not followed the Connecticut practice in the hearing which was had before him, and that upon the entire record the petitioner, Harry F. Morse, was entitled to be discharged and to go without day. Judge Thomas also denied the application of the Government to remove said Harry F. Morse to the Southern District of New York, so that the proceedings in Connecticut had fully terminated prior to the second arrest in New York, both by the denial of the Government's application to remove the said defendant to New York and by the decision in favor of the defendant upon the writ of *habeas corpus*. The Government's removal proceeding in Connecticut was

based in part upon a bench warrant issued upon the New York indictment, which was the same bench warrant upon which the appellant was subsequently arrested in New York on the fifth day of February, 1923 (fols. 10-11).

The Massachusetts proceeding for the removal of this appellant Benjamin W. Morse was initiated before a United States Commissioner and, evidence having been taken at length, was pending before him undetermined on the fifth day of February, 1923, the appellant Benjamin W. Morse being there admitted to bail. On February 8, 1923, the Boston Commissioner, Hon. Wm. A. Hayes, 2d, handed down his decision finding that there was no probable cause and discharging the defendant Benjamin W. Morse from custody.

From the foregoing, the Court will note, as the first important and established questions of fact, that at the time of the second arrest of the appellant in New York, on the sixth day of February, 1923—

1. The appellant, Benjamin W. Morse, was under bail in Massachusetts in the proceedings pending before the Commissioner which were then undetermined, and was also under bail and in the custody of his bondsmen on the bond given in the Washington jurisdiction.

2. Harry F. Morse (appellant in case No. 598) had been fully discharged in Connecticut and was under bail and in the custody of his bondsman on the bond given in the Washington jurisdiction.

With the Washington case definitely and peremptorily set for trial on the morning of February 6, 1923, the defendants, Benjamin W. Morse and Harry F. Morse, boarded the Federal Express of the New York, New Haven & Hart-

ford Railroad at their respective places of residence (Benjamin W. Morse at Boston, Mass., and Harry F. Morse at New London, Conn.), and proceeded by this, "the usual, shortest and most direct route" to Washington. While they were asleep in their berths, at midnight, and as the train was *en route* to Washington, passing through New York City, they were summarily and forcibly taken from their Pullman berths on the train by the United States marshal and his assistants in the Southern District of New York and arrested upon the bench warrants which had been previously issued on the New York indictment, and which bench warrants had been used in connection with the previous arrest of both of the defendants in the removal proceedings, as aforesaid. The petitioner Benjamin W. Morse immediately sued out a writ of *habeas corpus* and subsequently enlarged the averments of his petition, as allowed by statute, and, with the permission of the Court, by an additional affidavit, so that the entire matter was brought before the District Court upon the petition for *habeas corpus*, the return of the marshal, and the traverse or additional affidavits filed by the petitioner. Hon. Francis A. Winslow, United States Judge, Southern District of New York, after a hearing, as aforesaid, dismissed the petition, remanded the petitioner, and allowed an appeal to this Court.

Law Points.

1.

THE ARREST OF THE DEFENDANT IN NEW YORK CITY WHILE PASSING THROUGH NEW YORK EN ROUTE TO TRIAL IN WASHINGTON WAS ARBITRARY, UNAUTHORIZED, ILLEGAL, AND CONSTITUTED A VIOLATION OF THE CONSTITUTIONAL SAFEGUARD OF "DUE PROCESS OF LAW."

The Fifth Amendment to the Constitution provides:

> "Nor (shall any person) be deprived of life, liberty or property without due process of law."

The process which is meant in this clause of the Constitution is Federal process.

In re Mahon, 34 Fed. Rep. 530.

The law applies to the District of Columbia and proceedings therein or related thereto.

Lappin vs. District of Columbia, 22 App. Cas. (D. C.) 76.

Wilson vs. McDonald, 265 Fed. Rep. 432.

Groot vs. Reilly, 266 Fed. Rep. 1008.

"Due process of law" in each particular case means such exercise of the powers of Government as the settled maxims of law permit and sanction and under such safeguards for the protection of individual rights as those maxims prescribe for the class of case to which the one in question belongs.

Cooley on Constitutional Limitations, page 434 (6th Edition, 1890).

U. S. vs. Yount, 267 Fed. Rep. 861.

In the Yount case, *supra*, it is held that:

> "'Due process of law' within constitutional Amendments Five and Fourteen is equivalent to 'the law of the land' *and is intended to protect the citizens against arbitrary action* and to secure to all persons equal and impartial justice."
> *Davidson vs. New Orleans*, 96 U. S. 97.
> *Missouri Pacific Railway vs. Humes*, 115 U. S. 512.

In the much-quoted case of *Columbia Bank vs. Oakley* (1819), 4 Wheat. 244; 4 U. S. (L. Ed.) 559, it is held:

> "The words 'due process of law' were intended to secure the individual *from the arbitrary exercise of the powers of government*, unrestrained by the established principles of private rights and distributive justice."

In judicial proceedings "due process of law" must be a course of legal proceedings according to those rules and forms which have been established for the protection of private rights. It must be one that is appropriate to the case and just to the parties affected. It must be pursued in the ordinary manner prescribed by the law.

> *Burton vs. Plater*, 1893, 53 Fed. 904.
> *Ex parte McClusky*, 40 Fed. 74.
> *Ex parte Harlan*, 180 Fed. 119.

It is established by the foregoing that the sovereign cannot arbitrarily exercise summary power in total disregard of the rights of the individual and without consideration of the rights or parties to be affected. Due process of law and a consideration of existing rights is particularly needed in judicial proceedings, and the sovereign cannot arbitrarily

destroy those rights by mere summary action. In the case at bar the defendant had been absolutely and peremptorily ordered and *required* by the Court to be present before Judge Stafford and a jury in Washington for trial on the morning of February 6, 1923, under indictments there found by the sovereign. The case in Washington could not have proceeded to trial without the defendant; the charge was a felony, and his personal presence before the Court and jury had been definitely ordered and was required by law.

Lewis vs. U. S., 146 U. S. 372.
Hopt vs. Utah, 110 U. S. 579.
Diaz vs. U. S., 223 U. S. 442.

The action of the Government in arresting the defendant as he was passing through New York, and thereby preventing him from being present at his trial in Washington on February 6, 1923, could not under any consideration be held to have been—

> "according to those rules and forms which have been established for the protection of rights,"

referred to in the foregoing cases, but was, on the contrary, an absolute denial of the private rights of the individual to be present at the time that his case was to be called for trial in Washington. The petitioner was not a passenger upon an intrastate train; he had not voluntarily come into the jurisdiction of New York; he had previously resisted removal proceedings to the Southern District of New York and his resistance to the removal proceedings was actually pending undetermined before a United States Commissioner. The defendant, therefore, did not voluntarily come into the State of New York, but was merely *passing through New York*

en route to Washington, pursuant to the order of Justice Stafford, by "the usual, most direct, and shortest route" thereto. He was a passenger on an interstate car and train—the Federal Express. He did not leave the train when it arrived in New York, but was asleep in his berth when arrested. The appellant, having been peremptorily ordered to appear in Washington for trial, was not voluntarily within the State of New York, but he was obliged to pass through New York in order to reach Washington, unless he had traveled by water or by an unnecessarily circuitous route. He came from his place of residence and passed through New York for the sole purpose of reaching Washington, as directed by the Court. This was necessarily "a compulsory passing through New York" and has been so held in a somewhat similar case.

U. S. vs. Bridgeman, 24 Fed. Cas. 14645, 9 Biss. 221-223, 9 Rep. 74.

This is also the law of New York.

Sander vs. Harris, 14 N. Y. Suppl. 37.
Day vs. Harris, 14 N. Y. Suppl. 73.
Murphy vs. Sweezy, 2 N. Y. Suppl. 41.

There is no parallel in the suggestion made by counsel for the Government at the argument before Judge Winslow to the effect that if a defendant passing through Ney York stepped from the train and committed a crime at the station he could be arrested in New York. Nothing of that kind occurred or is involved in any way in this case.

Not only did the Government violate the constitutional rights of the defendants to "due process of law," but the "usual mode of process" was violated.

"Usual mode of process" applies to the procedure by which the offender may be arrested and imprisoned or bailed.

U. S. vs. Powloski, 270 Fed. Rep. 285.

In *U. S. vs. Baird,* 85 Fed. Rep. 633, a witness came into the State of New Jersey in response to a subpœna from a Federal Court. While in New Jersey he was arrested on State criminal process and was immediately released by the Court upon *habeas corpus* and the arrest vacated. Judge Kirkpatrick held:

> "It is further ordered that the said John J. Boyle be safely conducted back to the City of Philadelphia in the Eastern District of Pennsylvania from whence he came; and that the marshal of the United States for the District of New Jersey attend so that he shall have safe passage to the place from whence he came."

It was further held that Boyle, having been subpœnaed by the United States to attend in New Jersey as a witness and having left Pennsylvania for that purpose, was entitled to protection from arrest by the State authorities of New Jersey for any alleged offense before then charged to have been committed by him.

How much more definite should the protection be when both proceedings are conducted by the same sovereign, as in the case at bar, where we have the sovereign in one jurisdiction directing the defendant to appear and using the summary and arbitrary power of the Government in another jurisdiction to prevent him from appearing? It was known to the Government authorities in the Southern District of New York that the case of the appellant Benjamin W. Morse in Washington had been peremptorily set for trial for February

6, 1923, and it was known that he was *en route* to his trial. The sovereign, therefore, with full knowledge of the situation, detained and restrained the defendant in another jurisdiction, and thereby prevented his trial from proceeding and risked the forfeiture of his bail in Washington. Was this "due process of law" or was it a mere arbitrary exercise of the power of arrest without any consideration whatever for the rights of the defendant? Can this Court say that the arrest of the defendant was "orderly procedure," and that it was " in the ordinary manner prescribed by the law" and "according to those rules and forms which have been established for the protection of private rights"?

In *Chandler vs. Sherman*, 162 Fed. Rep., at page 19, it is held that—

> "A Federal Court has power to protect a litigant therein from seizure of his person by the authority of a State while in attendance upon the trial of his case."

If the power of the Federal Court could be used to protect a litigant from interference in a State Court, how much more should it be exercised in favor of a litigant in its own courts who is unfortunate enough to have proceedings brought against him by the sovereign in two jurisdictions.

Unreasonable and arbitrary exercises of power are illegal, violating the guarantee of due process of law, and persons deprived of liberty under such acts are entitled to be released by writ of *habeas corpus* issued from the proper courts of the United States.

8 *Cye.* 1088.

In re Ah Joy, 29 Fed. Rep. 181.

In re Lee Tong, 18 Fed Rep. 253.

Again, "due process of law" is defined as—

> "Law in the regular course of administration through courts of justice."
>
> 8 *Cyc.* 1081.
>
> 2 *Kent's Commentaries* 10.

Can it be solemnly argued that the arrest of these defendants in New York in a manner which operated to prevent their attendance at the trial in Washington was "in the regular course of administration through courts of justice?" If courts of justice were to be administered in this manner throughout the United States the conditions which would ensue are so apparent as to condemn the practice without argument. Citizens accused of crime would be of all men most miserable.

The effect of the arrest in New York was to prevent the trial in the Supreme Court of the District of Columbia from proceeding at the time fixed. The regular course of administration through courts of justice required due consideration for the rights of the defendants in whichever jurisdiction the trial was appointed to be held.

Again, we have "due process of law" defined as—

> "The application of law as it exists in the fair and regular course of administrative procedure."
>
> 8 *Cyc.* 1081.
>
> 2 *Kent's Commentaries* 10.

And this was the law of Blackstone, where it is held:

> "Jurors, suitors and witnesses in attendance in a court of record are privileged from arrest."
>
> 3 *Blackstone's Commentaries* 289.
>
> 3 *Cyc.* 274.

In a South Carolina case, *Sadler vs. Bay,* 5 Rich., S. C., 523, the defendant was arrested and summoned to appear at Chester; while on his way there he was arrested on the same cause of action and summoned to appear at York, the first suit having been discontinued without his knowledge. It was held that he was privileged from arrest. (See also a Michigan case.)

Baldwin vs. Branch, 48 Mich. 525, 12 N. W. 686, where it was held that where appearance bail had been accepted from one arrested on a criminal warrant issued by a justice he cannot, pending his release on bail, be arrested in a civil *capias* upon the same matter at the suit of the same complainant. In the case at bar the sovereign is the complainant in both jurisdictions.

In *Ponzi vs. Fessenden,* 258 U. S. 260 (opinion by Chief Justice Taft), this Court had occasion to comment upon the fact that a defendant accused of crime by the sovereign cannot be in two places at the same time and inferentially condemned the Government's practice in the case at bar.

The Court held:

> "One accused of crime has a right to a full and fair trial according to the law of the Government whose sovereignty he is alleged to have offended. * * * (he) 'cannot be in two places at the same time. He is entitled to be present at every stage of the trial of himself in each jurisdiction with full opportunity for defense.' "
>
> *Frank vs. Mangum,* 237 U. S. 308-341.
> *Lewis vs. U. S.,* 146 U. S. 370.
>
> "If that is accorded him, he cannot complain."

Benjamin W. Morse was, therefore, entitled to be present in Washington on the morning of the 6th day of February,

1923, when his case had been set for trial, and the action of the sovereign in subjecting him to a second arrest in New York constituted, not only a violation of his constitutional rights, but a clear interference with the proper functioning of the Washington Court.

In *King vs. Orr,* 5 U. C. Q. B. O. S. 724, it is held:

> "When a justice takes bail for an appearance at a fixed time, a second arrest by complainant for the same charge before the time appointed is illegal."

The rule in civil cases has always been:

> "Parties to civil actions while in actual attendance upon the courts, and while going to and returning from the courts, are exempt from arrest under civil process."

2.

THE SECOND ARREST OF APPELLANT UPON THE SAME BENCH WARRANT WHICH HAD BEEN USED AS THE BASIS OF THE REMOVAL PROCEEDING IN MASSACHUSETTS WAS ILLEGAL, AS THE BENCH WARRANT HAD SPENT ITS FORCE; WAS *functus officio,* AND THE DISCHARGE IN MASSACHUSETTS OPERATED LEGALLY TO DISCHARGE THE APPELLANT FROM ANY FURTHER CONFINEMENT OR PROCEDURE UNDER THAT PARTICULAR PROCESS.

The bench warrant was originally issued by the District Court in New York on July 19, 1922 (fols. 49-50). It was sent to the United States Attorney in Massachusetts and made the basis of removal proceedings in that State (fols. 10-11).

On February 5, 1923, appellant was subjected, while passing through New York, to an arrest upon the *same bench*

warrant which had been previously used in the removal proceedings in Massachusetts (fols. 10-11).

This was an improper and oppressive use of the Court's process.

In *Ex parte George Milburn*, 34 U. S. (9 Peters) 704, Judge Story wrote:

> "A discharge of a party under a writ of *habeas corpus* from the process under which he is imprisoned discharges him from any further confinement under the proceeding; but not under any other process which may be issued against him under the same indictment."

A different question might be presented if a new bench warrant had been issued by the District Court in New York upon application duly made by the United States Attorney. But here we have the same process functioning in two jurisdictions and the appellant subjected to a second confinement when propriety of the first confinement was still under judicial consideration by the Commissioner.

A rearrest without any warrant or process is entirely unwarranted. If such a proceeding were tolerated, the writ of *habeas corpus* would be of no avail.

Matter of Titton, 76 Howard Prac. (N. Y.) 303.

An order of discharge other than for technical or cureable defects terminates the pending proceeding so that the person discharged cannot be further restrained thereunder or again arrested or held in custody unless a new prosecution is instituted.

In re Crandall, 59 Kansas 671.

State vs. Holm, 37 Minn. 405.

After a person has been admitted to bail, an officer has no right to rearrest him under the same process.

5 *Corpus Juris*, 437.

To authorize a rearrest, a new warrant should be issued.

Sherman vs. State, 2 Ga. A. 686, 58 S. E. 1122.

> "When a party was in attendance before the district court of a county in which the crime charged was alleged to have been committed, in compliance with prior regular proceedings by which he was held by a committing magistrate to await the action of the grand jury, and before the grand jury had acted on his case or been discharged, he was again arrested on a charge of the commission of the same offense, the Court held the second arrest to be illegal."
>
> *State vs. Riley*, 109 Minn. 437, 124 N. W. 13.

> "When a justice takes bail for appearance at a fixed time, a second arrest by the same complainant, for the same charge, before the time appointed is illegal."
>
> *King vs. Orr*, 5 U. C. Q. B. O. S. 724.

In those cases where a second arrest has been tolerated, there has uniformly been a "new proceeding" with "new process" after discharge on the first proceeding.

In re White, 45 Fed. R. 237.

In re Collins vs. Loisel, 262 U. S. 430, there was a "new proceeding" with new affidavits after a previous discharge.

See also *Sutton vs. Butler*, 74 Misc. 251.

Hinds vs. Parker, 11 App. Div. 327.

3.

THE SUPREME COURT OF THE DISTRICT OF COLUMBIA HAD EXCLUSIVE JURISDICTION OF THE FERSON OF THE DEFENDANT BECAUSE:

1. IT HAD FIRST ACQUIRED JURISDICTION AND ADMITTED THE APPELLANT TO BAIL.

2. IT HAD NOT GIVEN CONSENT TO AN ARREST IN NEW YORK OR TO AN INTERFERENCE WITH ITS DATE FIXED FOR TRIAL.

3. THE WASHINGTON JURISDICTION HAD NOT BEEN EXHAUSTED.

The defendant having been first arrested in the District of Columbia and there admitted to bail, was legally under the exclusive control and jurisdiction of that Court, and of his bondsman.

In *Ex parte Johnson,* 167 U. S. 120, this rule is well laid down and fully discussed. The opinion is by Justice Brown who held that if the United States Court for the Eastern District of Texas:

> "Had acquired jurisdiction it was entitled to try the defendant,"

and

> "In this connection jurisdiction of the 'case' that is the crime, is indistinguishable from jurisdiction of the person who is charged with the crime. We know of no reason why the rule so frequently applied in cases of conflicting jurisdiction between Federal and State Courts should not determine this question. Ever since the case of Ableman vs. Booth, 21 How. 506, it has been the settled doctrine of this Court that a

Court having possession of a person or property cannot be deprived of the right to deal with such person or property until its jurisdiction is exhausted and that no other Court has the right to acquire such custody or possession."

15 *Corpus Juris,* 1166;
Chandler vs. Sherman, 162 Fed. 19;
Daret vs. Duncan, 4 Fed. Cases No. 581;
Sadlier vs. Fallen, 21 Fed. Cases No. 12209;
Peo. vs. Sage, 11 A. D. 4.

In *U. S. vs. Marrin,* 227 Fed. Rep., 314, 318, the Court said:

"If a person be answerable to two different jurisdictions for offenses against the laws of each it is a physical fact that he cannot be at the same time in the control of each. It is, therefore, necessary that one give way to the other for the time being. It is convenient and desirable that there be a rule by which it can be determined which authority shall make way for the other. This rule is that known as the rule of comity. It answers with Courts and cabinets, in law and in diplomacy substantially the same purpose which personal courtesies serve in the social relations of life. *One of the principles is that the court which first asserted jurisdiction may continue its assertion without interference from the other.*"

The Washington Court having been the Court in which the defendant was first indicted and in which he was first admitted to bail, had exclusive jurisdiction at the time of the second illegal arrest in New York to proceed to trial on February 6, 1923, the time appointed, without interference from the representative of the sovereign in New York—the

United States Attorney for the Southern District of New York.

> "The tribunal which first gets jurisdiction holds it to the exclusion of the others until its duty is fully performed and the jurisdiction invoked is exhausted; and the same rule applies alike in both civil and criminal causes. The removal of a person by a court of competent jurisdiction beyond the control of his bondsmen, thus rendering them unable to produce the person at the time and place set for trial as undertaken by the condition of his bond, is in the language of the authorities 'an act of law' and can be set up in defense to a suit on the bond."
>
> *In re James,* 18 Fed. Rep. 853.

> "A court which has in its custody a person charged with a crime has exclusive custody and jurisdiction until the question of his guilt or innocence is determined; and a person arrested on a Commissioner's warrant and either in custody or held to bail pending his examination for removal to another district in answer to a criminal charge *is not subject to a second arrest* for removal to a different district until the first proceeding has been terminated."
>
> *In re Beavers,* 125 Fed. Rep. 988.

See, also,

Ponzi vs. Fessenden, 258 U. S. at p. 260.
Covell vs. Heyman, 111 U. S. 176.
McCauley vs. McCauley, 202 Fed. R. 280-284.
State vs. Chimault, 55 Kans. 326.
Ex parte Earley, 3 Ohio Dec. 105.
Commonwealth vs. Fuller, 8 Metc. 318.
Hill Mnfg. Co. vs. Providence & N. Y. S. S. Co., 113 Mass. 495.
Ayers vs. Farrell, 196 Mass. 350.

Wayman vs. Southard, 10 Wheat. 1.
Taylor vs. Taintor, 16 Wall. 366.
Felte vs. Murphy, 201 U. S. 123.
Harkvader vs. Wadley, 172 U. S. 163.
In re Johnson, 167 U. S. 120.
Opinion of the Justices, 201 Mass. 607.

In the case at bar the United States is "the common sovereign" and also "the common accuser." The Washington Court which first acquired jurisdiction had never given consent to arrest in the Southern District of New York; nor is any consent shown in the moving papers so that the arrest in the Southern District of New York created a condition which necessarily conflicted with and disturbed the due administration of justice in the Washington Courts. This was referred to by Judge Brandeis in *Stallings vs. Splain,* 253 U. S. 342, where he says:

> "The question would merely have been whether a second arrest properly could be made when it conflicted with the first."

By the arrest in New York the defendant was deprived of his Constitutional rights to a speedy trial in the District of Columbia, and by the same sovereign.

Beavers vs. Haubert, 198 U. S. 85.

The sovereignty of the United States had first attached its jurisdiction in Washington and had not been asked to yield it.

In *Peckham vs. Henkel,* 216 U. S. 482, it is held:

> "The present case differs upon this point from that of Beavers *vs.* Haubert, in that *the consent of the court of prior jurisdiction* was not obtained as in that.

> In that case the court reversed the question as to 'whether the Government had the right of election *without such consent*' to proceed in either of two districts in which indictments were pending."

In extradition cases there is immunity from a second arrest.

In re Baruch, 41 Fed. Rep. 472.

4.

THE DEFENDANT HAVING BEEN ADMITTED TO BAIL IN WASHINGTON WAS ALSO LEGALLY IN THE CUSTODY OF HIS BONDSMAN AS HE PASSED THROUGH NEW YORK ON THE SLEEPING CAR AND WAS IN A LEGAL SENSE AS MUCH UNDER ARREST AS IF ACTUALLY CONFINED.

The general rule is as stated by Mr. Justice Wayne in *Taylor vs. Taintor,* 16 Wall. 371—a leading case.

> "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of his original imprisonment."

See, also, *Beavers,* 125 Fed. 988, affirmed 194 U. S. 73.

A person while held to bail in one court is not subject to arrest under an indictment in another court, particularly without the consent of the first Court.

(Same cases as last above cited) and also:

Hernandez vs. Camobell, 11 N. Y. Superior Court, 642.

10 *Howard's Practice,* 433.

5.

THE ARREST IN NEW YORK CONFLICTED WITH THE WASHINGTON JURISDICTION AND VIOLATED THE PRINCIPLE OF JUDICIAL COMITY.

The case in Washington before Mr. Justice Stafford could not proceed unless the defendant was personally present; and he could not be present because on the very midnight before his trial he was arrested and detained by the United States, the common accuser, in the Southern District of New York. This was wholly subversive of the principle of judicial comity, which is defined as:

> "The principle in accordance with which the course of one State or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect."
>
> *Mast vs. Stover Mnfg. Co.,* 177 U. S. 485.

Had the Supreme Court in the District of Columbia been requested to consent to the arrest in New York a different state of facts would be here presented.

250 U. S. 283:

> "Comity * * * is not a rule of law but a rule of practice, convenience, and expediency."
>
> *Watts vs. Unione Austriaca di Navigazione,* 224 Fed.

In the *Marrin case,* 227 Fed. Rep. at page 317, it is held:

> "It is too clear for necessity of citing supporting authorities that any court has the power to assert its jurisdiction and in the legal sense preserve its dignity

> by preventing the interference of any other authority with the work which that court had in hand to do."
>
> *"In the enforcement of this principle courts will relieve from arrest and even* from the service of civil process on witnesses who are in attendance upon the business of the court. In recognition of the same principle no court will direct the services of its process upon persons who are thus in attendance upon another court."

This Court will observe the application of the facts of the case at bar as applied to the rule of law above laid down. The defendant being actually in the custody of his bondsman in the Washington jurisdiction was actually in that jurisdiction, in the legal sense, and being *en route* to his trial was not subject to a second arrest in the Southern District of New York, particularly upon a bench warrant upon which removal to New York had been denied. In recognition and enforcement of the great principle of judicial comity, and in order to preserve the due and orderly administration of justice and the application of the Constitutional right of due process of law, the District Court should have relieved from the wholly arbitrary and illegal second arrest by vacating the same upon the appellant's application by *habeas corpus*.

This is not a case where a defendant was unlawfully abducted or kidnapped, from one State, or one jurisdiction, to another, or where he is fraudulently brought into the jurisdiction, or where he has voluntarily come into the jurisdiction; it is a case of a defendant duly admitted to bail in another jurisdiction and *en route* to his trial, being arrested upon an old bench warrant at a time when removal proceedings against him were pending undischarged.

"Where the accused has been arrested with a view to extradition, a second warrant for his arrest cannot be executed while *habeas corpus* proceedings are pending."

In re Farez, 8 F. Cas. No. 4644, 7 Blatchf. 34.

It is submitted that the facts of this case are wholly different from any case recorded in the books. There is no precedent anywhere which would authorize or justify the second arrest which the Federal authorities perpetrated in the Southern District of New York upon this petitioner in the arbitrary, high-handed and wholly illegal manner disclosed by this record.

This case stands wholly by itself as a concrete example of the oppressive tactics of certain Government officials and the arbitrary exercise of the great power of the United States contrary to the due process clause of the Constitution and to all of the great legal principles sanctioned by the Courts for the protection of the citizen and the orderly and dignified administration of justice. It was an entire disregard of the decision of Judge Thomas and of the order of Judge Stafford that the trial in his Court should proceed on the day fixed by him, and of all of the principles of due process of law and judicial comity.

6.

IN THE CONSIDERATION OF HIS APPLICATION FOR DISCHARGE BY HABEAS CORPUS, BENJAMIN W. MORSE, WHILE NOT A PARTY THERETO, WAS ENTITLED TO THE FULL BENEFIT OF THE DECISION OF JUDGE THOMAS IN THE CASE OF HARRY F. MORSE AS THE SAME INDICTMENT WAS INVOLVED. SUCH DECISION WAS NOT RES ADJUDICATA OF ALL ISSUES OF LAW AND FACT NECESSARILY INVOLVED IN THE RESULT AND SHOULD NOT HAVE BEEN ARBITRARILY DISREGARDED BY THE GOVERNMENT.

One of the questions "necessarily involved" in Judge Thomas' decision was that the bench warrant issued in New York and in connection with appellant's arrest in removal proceedings was illegally issued. This holding the Government officials set at naught and wholly defied by using the same bench warrant for a second arrest and subjecting appellant to a "second confinement" thereunder.

The Government had instituted removal proceedings in Connecticut against Harry F. Morse, and such proceedings were had in that jurisdiction that Judge Thomas held that the indictment in the Southern District of New York upon which the arrest was made did not charge the defendants with the commission of a Federal offense. The opinion of Judge Thomas is printed in the record (Fols. 33-49) herein and is referred to for the full detail of the conclusions there reached.

It is submitted that the question of whether the indictment charged an offense under Federal laws was a *question of substantive law*, and where a matter is decided as one of substantive law it is conclusive upon the Government until

reversed upon appeal. There was no technicality involved in the decision of Judge Thomas. It was a broad holding that the New York indictment charged no offense whatsoever.

It must be admitted that the legal sufficiency of the indictment raised a question of substantive law, and this question was submitted to Judge Thomas both by the defendant Harry F. Morse and by the Government, argued at length, and briefs submitted. Judge Thomas held that the indictment was bad, that it did not charge the commission of a Federal offense, and discharged the defendant Harry F. Morse. This then became the law of the case until reversed on appeal. It could not be arbitrarily disregarded by the Government, as it was in the instant case by a second arrest in New York.

The arrest in New York not only violated the principle of judicial comity, as related to the Washington jurisdiction, but also wholly violated, disregarded and set for naught the decision of Judge Thomas in the Connecticut jurisdiction.

Every principle of due process of law and regard for the proper forms of orderly procedure requires that the decision of Judge Thomas should stand as the controlling law of the case until reversed. The decision of a Federal judge having jurisdiction of the subject-matter and the person of a defendant, that the indictment did not charge an offense under Federal laws is, we submit, just as much a decision upon the merits of that phase of the controversy as in the *Oppenheimer case,* 242 U. S. 85, wherein Judge Holmes wrote:

> "Of course the quashing of a bad indictment is no bar to a prosecution upon a good one; but a judg-

> ment for the defendant upon the ground that the prosecution is barred goes to his liability as matter of substantive law and one judgment that he is free as matter of substantive law is as good as another."

Even the decision of a United States Commissioner, while not given the dignity of res-judicata has been held to be conclusive. It is held in

U. S. vs. Hoa, 167 Fed. Rep. 211

that:

> "The decision of the United States Commissioner refusing to commit a prisoner for removal to another Federal district for trial of a criminal charge does not render the question of the right to such removal *res judicata,* but ordinarily in the absence of special circumstances *it should be held conclusive on the same facts."*

See also:

Palmer vs. Thompson, 20 App. D. C. 273; 29 *Corpus Juris* 178.
Palmer vs. Colladay, 18 App. D. C. 428.
Targun vs. Bean, 109 Me. 189.
McConologues Case, 107 Mass. 154.
Exparte Hamilton, 65 Miss. 98.
Exparte Jilz, 64 Mo. 205.
Yates vs. People, 6 Johns 337.
In re Crow, 60 Wis. 349.

In *Horn vs. Mitchell,* 223 Fed. Rep., 550, it is held that:

> "When an order is made by a judicial officer of one Federal district having authority to act for the removal of a person arrested in that district to another where he is charged with crime, and the order is reg-

> ular on its face and was based on proceedings of which the Court had jurisdiction it may not be reviewed by the Court in the latter district in *habeas corpus* proceedings."

An order of judgment discharging a person in *habeas corpus* proceedings is conclusive in his favor that he is illegally held in custody and is *res judicata* of all issues of law and fact necessarily involved in that result.

Judge Thomas concededly had jurisdiction of the person of the defendant Harry F. Morse; he had jurisdiction of the case; and the Government submitted its rights when it asked Judge Thomas to issue a warrant of removal to the Southern District of New York.

In the *habeas corpus* proceeding before Judge Winslow based upon the second arrest, Judge Winslow was in effect asked by the Government to review, or sit in appeal upon, the decision of Judge Thomas, and not to give it any effect whatsoever. If Judge Thomas was right and the indictment here does not charge an offense, then the defendant ought not to have been held in any event. Could Judge Winslow say upon the argument before him that the decision of Judge Thomas was wrong; or should the decision upon that matter in the orderly course of judicial procedure have been left to the Circuit Court of Appeals upon appeal by the Government?

Was Judge Winslow authorized to wholly disregard the decision of a District Judge of concurrent authority and jurisdiction upon a question of law and arbitrarily set it aside, or should it have been held that due process of law required the Government to appeal from the decision of Judge Thomas and that until reversed upon appeal such decision was the law of this case?

> "When an order is made in one federal district, by a judicial officer having authority to act, for the removal of a person arrested in that district to another when he is charged with crime, such order, if regular on its face, and based on proceedings of which the Court has jurisdiction, will not be reviewed on *habeas corpus* in the second district."
>
> *Horn vs. Mitchell,* 223 Fed. R. 549; aff. 232 Fed. R. 879.
>
> *U. S. vs. Robinson,* 126 Fed. R. 1016.

Every principle of judicial comity and due process of law required that this second arrest should have been vacated and the Government remitted to its right to appeal from the decision of Judge Thomas in the Connecticut District.

See also:

Williams vs. State, 83 S. K. 790; 169 Ind. 384;

U. S. vs. Chungshee, 71 Fed. Rep. 279.

Freeman on Judgments, Section 324, sustains this view in the following language:

> "If, on the other hand, the prisoner is discharged from custody this is an adjudication that at that time he was entitled to his liberty and is conclusive in his favor should he be again arrested unless some authority can be shown for holding him which did not exist at the time of his discharge."

And in *Church on Habeas Corpus,* Section 386, I find:

> "Again it has been held that in proceedings upon *habeas corpus* the determination of the Court upon the facts has the effect of a verdict of a jury."
>
> *Bennett vs. Bennett,* 61 Iowa 199; 16 N. W. 91.

Indeed, the authorities, without exception, seem to hold that when a person has been discharged upon *habeas corpus* all issues of law and fact necessarily involved are *res judicata* and the person so discharged cannot for the same cause be "lawfully rearrested" upon the same process. Such in effect was the ruling of this Court in *Collins vs. Loisel,* 262 U. S. 430.

In the Connecticut proceeding all of the facts before the Commissioner, together with the indictment, were before Judge Thomas upon the question of probable cause and the decision of Judge Thomas found that upon these facts the allegations of the indictment could not be sustained; and that the indictment is defective as matter of law.

We submit that this decision should have a conclusive effect until reversed. See also:

Sutton vs. Butler, 74 Misc. 251; 76 Fed. Rep. 951; 133 N. Y. Supp. 936; 66 A. D. 327; 42 N. Y. Supp. 955.

Hinds vs. Parker, 11 A. D. 327.

These cases last cited hold in substance that:

> "A person discharged from custody on *habeas corpus* may not lawfully be arrested again for the same cause."
>
> "An order discharging a person in *habeas corpus* proceedings made by a court possessing jurisdiction has a binding force and effect upon all parties concerned."

7.

THE WRIT OF HABEAS CORPUS SHOULD HAVE BEEN SUSTAINED, THE ARREST OF THE DEFENDANT VACATED, AND THE DEFENDANT DISCHARGED.

A summary of the facts and law of this case will disclose the very unusual situation presented to the Court for decision. If the position of the Government is sustained this Court is asked to hold that a defendant in a criminal suit with a removal proceeding actually pending undetermined discharged in one jurisdiction and in the custody of his bondsman and also in the custody of his bondsman for appearance in another Federal jurisdiction for trial and actually necessarily *en route* to that latter jurisdiction for trial in accordance with the order of the Court, may be summarily detained in the jurisdiction to which the Government is at the time seeking his removal upon an indictment which had been judicially held not to charge a criminal offense—all, we submit, in violation of every principle of judicial comity, in violation of the right of the Washington bondsman to produce the appellant before the Court for trial, and in violation of the orderly and due processes of the law, and of the basic principles of fairness in the administration of justice. This Court is dealing with the actions of the representatives of the Federal Government which Government in the instant case is both sovereign and accuser, with one hand pulling the defendant into the Washington court for trial and with the other hand forcibly holding him in New York, so that he could not appear in Washington. An anomolous and wholly unusual situation is here created which it is not believed that

this Court will sanction. The decision of Judge Thomas should have been held conclusive upon the same process until reviewed and reversed upon appeal and the Court of Judge Stafford in the District of Columbia should have been accorded full respect by the representatives of the Federal Government.

The facts set out in the petition and supplementary affidavits of the appellant were not denied, and it is respectfully submitted that the writ of *habeas corpus* should have been sustained and the defendant discharged from custody.

NASH ROCKWOOD,
Attorney for the Defendant, Benjamin W. Morse, 527 Fifth Avenue, Borough of Manhattan, New York City.

CHARLES T. LARK,
Of Counsel.

DECEMBER 1, 1924.

JAN 3 1925

WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 598.

HARRY F. MORSE, *Appellant*,

vs.

THE UNITED STATES OF AMERICA.

Appeal by Harry F. Morse from Judgment of the District Court of the United States for the Southern District of New York, Entered June 20, 1924, Dismissing His Application for Release by Habeas Corpus and Remanding Him to the Custody of the Marshal of the Southern District of New York.

BRIEF FOR APPELLANT.

NASH ROCKWOOD,
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CHARLES T. LARK,
Of Counsel.

December 1, 1924.

John B. Wentworth Law Printing Company, Washington, D. C.

INDEX.

CASES CITED.

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BRIEF FOR APPELLANT.

Statement of Procedure.

On February 6, 1923, while *en route* through New York from his residence in Connecticut to attend his trial upon criminal charges pending against him in the Supreme Court of the District of Columbia, the appellant was forcibly re-

moved from the train at New York City by the marshal of the Southern District of New York, acting under authority of a bench warrant issued upon an indictment found in said District charging the appellant with the crime of conspiracy.

Appellant, contending that his arrest was illegal, applied for and procured a writ of *habeas corpus* and demanded immediate discharge from custody.

The marshal of the Southern District of New York filed a return to the writ, averring, in substance, that the arrest was made by virtue of a bench warrant issued upon an indictment filed in the Court on April 27, 1922 (fols. 4-6).

With the permission of the Court, the appellant filed an additional affidavit in support of his application for discharge and as a traverse and reply to the return of the marshal, verified February 23, 1923 (fols. 6-32), the appellant was produced before Hon. Francis A. Winslow, United States District Judge for the Southern District of New York, and admitted to bail pending the determination of his application by *habeas corpus,* in the sum of fifteen thousand dollars ($15,000), which was furnished. Judge Winslow subsequently, on July 19, 1924, dismissed the writ of *habeas corpus* (fols. 53-54) and filed an opinion (fols. 49-53). The appellant filed five assignments of error, averring that his arrest and detention was in violation of his rights under the Constitution of the United States and the due process clause of the Constitution (fols. 54-56), and presented his petition for appeal to the Supreme Court of the United States (fols. 56-57), which was allowed (fols. 57-61), citation served, appeal to this Court duly perfected, and bail fixed upon appeal in the sum of five thousand dollars ($5,000), the appeal to operate as a supersedeas until the further order of the District Court.

Statement of Facts.

The facts are undisputed and are substantially as follows:

In January, 1922, the appellant was indicted by two separate indictments in the Supreme Court of the District of Columbia charged with having conspired to defraud the United States and to commit offenses against the United States in the matter of the alleged cheating and defrauding of the Fleet Corporation. The defendant was arraigned in the District of Columbia, pleaded not guilty, and, after the disposition of preliminary motions, admitted to bail and the trial of the indictments upon the merits was *peremptorily* set by Hon. Wendell P. Stafford, Justice of the Supreme Court of the District of Columbia, for trial in the said Supreme Court at 10 o'clock a. m. on February 6, 1923.

In April, 1922, the defendant was also indicted by a Federal grand jury in the Southern District of New York charged with having conspired to violate the provisions of Section 37 and Section 215 of the Federal Penal Code in the alleged fraudulent use of the United States mails. At the time of the indictment in New York a codefendant, Benjamin W. Morse (also appellant here in case No. 597), was in Boston, Massachusetts, where he resided, and the appellant Harry F. Morse was in the State of Connecticut, where he resided. The Government instituted removal proceedings under Section 1014 of the Revised Statutes in both the Massachusetts and Connecticut jurisdictions to remove the said respective defendants to New York for trial.

In Connecticut, removal proceedings for the removal to New York of Harry F. Morse were instituted before a United States Commissioner, who, after hearing oral testimony

comprising several hundred typewritten pages of testimony and much documentary evidence, decided in favor of the Government and ordered the appellant Harry F. Morse committed to the custody of the marshal for removal. Upon this hearing the Government introduced evidence and cross-examined witnesses. The said Harry F. Morse thereupon applied for a writ of *habeas corpus* to Hon. Edwin S. Thomas, United States Judge in the District of Connecticut, and the United States applied for a warrant of removal. By agreement of counsel, both proceedings in Connecticut—that is, the removal proceedings and the *habeas corpus* proceedings—were consolidated and heard together, and Judge Thomas, after a full hearing and examination of the evidence taken before the United States Commissioner, in an opinion which is attached to the petition for writ of *habeas corpus* herein (fols. 33-49), held that the New York indictment did not charge the defendant Harry F. Morse (appellant here) with the commission of a criminal offense under the United States laws; that there was no probable cause to believe the said defendant, Harry F. Morse, guilty of the commission of a crime; that the Commissioner had not followed the Connecticut practice in the hearing which was had before him, and that upon the entire record the petitioner, Harry F. Morse, was entitled to be discharged and to go without day. Judge Thomas also denied the application of the Government to remove said Harry F. Morse to the Southern District of New York, so that the proceedings in Connecticut had fully terminated prior to the second arrest in New York, both by the denial of the Government's application to remove the defendant to New York and by the decision in favor of the said defendant upon the writ of *habeas corpus*.

The Government's removal proceeding in Connecticut was based in part upon a bench warrant issued upon the New York indictment, which was the same bench warrant upon which the appellant was subsequently arrested in New York on the fifth day of February, 1923 (fols. 10-11).

The Massachusetts proceeding for the removal of the defendant Benjamin W. Morse was initiated before a United States Commissioner and, evidene having been taken at length, was pending before him undetermined on the fifth day of February, 1923, the defendant Benjamin W. Morse being there admitted to bail. On February 8, 1923, the Boston Commissioner handed down his decision finding that there was no probable cause and discharging the defendant Benjamin W. Morse from custody.

From the foregoing, the Court will note, as the first important and established questions of fact, that at the time of the second arrest of the appellant in New York, on the sixth day of February, 1923—

1. The petitioner, Harry F. Morse, had been fully discharged in Connecticut and was under bail and in the custody of his bondsman on the bond given in the Washington jurisdiction.

2. That the defendant, Benjamin W. Morse, was under bail in Massachusetts in the proceedings pending before the Commissioner which were then undetermined, and was also under bail and in the custody of his bondsman on the bond given in the Washington jurisdiction.

With the Washington case definitely and peremptorily set for trial on the morning of February 6, 1923, the defendants, Harry F. Morse and Benjamin W. Morse, boarded the Federal Express of the New York, New Haven & Hart-

ford Railroad at their respective places of residence (Benjamin W. Morse at Boston, Mass., and Harry F. Morse at New London, Conn.), and proceeded by this, "the usual, shortest and most direct route" to Washington. While they were asleep in their berths, at midnight, and as the train was *en route* to Washington, passing through New York City, they were summarily and forcibly taken from their Pullman berths on the train by the United States marshal and his assistants in the Southern District of New York and arrested upon the bench warrants which had been previously issued on the New York indictment, and upon which bench warrants had been used in connection with the previous arrest of both of the defendants in the removal proceedings, as aforesaid. The petitioner Harry F. Morse immediately sued out a writ of *habeas corpus* and subsequently enlarged the averments of his petition, as allowed by statute, and, with the permission of the Court, by an additional affidavit, so that the entire matter was brought before the District Court upon the petition for *habeas corpus,* the return of the marshal, and the traverse or additional affidavits filed by the petitioner. Hon. Francis A. Winslow, United States Judge, Southern District of New York, after a hearing, as aforesaid, dismissed the petition, remanded the petitioner, and allowed an appeal to this Court.

Law Points.

1.

THE ARREST OF THE DEFENDANT IN NEW YORK CITY WHILE PASSING THROUGH NEW YORK EN ROUTE TO TRIAL IN WASHINGTON WAS ARBITRARY, UNAUTHORIZED, ILLEGAL, AND CONSTITUTED A VIOLATION OF THE CONSTITUTIONAL SAFEGUARD OF "DUE PROCESS OF LAW."

The Fifth Amendment to the Constitution provides:

> "Nor (shall any person) be deprived of life, liberty or property without due process of law."

The process which is meant in this clause of the Constitution is Federal Process.

In re Mahon, 34 Fed. Rep. 530.

The law applies to the District of Columbia and proceedings therein or related thereto.

Lappin vs. District of Columbia, 22 App. Cas. (D. C.) 76.

Wilson vs. McDonald, 265 Fed. Rep. 432.

Groot vs. Reilly, 266 Fed. Rep. 1008.

"Due process of law" in each particular case means such exercise of the powers of Government as the settled maxims of law permit and sanction and under such safeguards for the protection of individual rights as those maxims prescribe for the class of case to which the one in question belongs.

Cooley on Constitutional Limitations, page 434 (6th Edition, 1890).

U. S. vs. Yount, 267 Fed. Rep. 861.

In the Yount case, *supra*, it is held that:

> "'Due process of law' within constitutional Amendments Five and Fourteen is equivalent to 'the law of the land' *and is intended to protect the citizens against arbitrary action* and to secure to all persons equal and impartial justice."
> *Davidson vs. New Orleans*, 96 U. S. 97.
> *Missouri Pacific Railway vs. Humes*, 115 U. S. 512.

In the much-quoted case of *Columbia Bank vs. Oakley* (1819), 4 Wheat. 244; 4 U. S. (L. Ed.) 559, it is held:

> "The words 'due process of law' were intended to secure the individual *from the arbitrary exercise of the powers of government*, unrestrained by the established principles of private rights and distributive justice."

In judicial proceedings "due process of law" must be a course of legal proceedings according to those rules and forms which have been established for the protection of private rights. It must be one that is appropriate to the case and just to the parties affected. It must be pursued in the ordinary manner prescribed by the law.

Burton vs. Plater, 1893, 53 Fed. 904.
Exparte McClusky, 40 Fed. 74.
Exparte Harlan, 180 Fed. 119.

It is established by the foregoing that the sovereign cannot arbitrarily exercise summary power in total disregard of the rights of the individual and without consideration of the rights or parties to be affected. Due process of law and a consideration of existing rights is particularly needed in judicial proceedings, and the sovereign cannot arbitrarily

destroy those rights by mere summary action. In the case at bar the defendant had been absolutely and peremptorily ordered and *required* by the Court to be present before Judge Stafford and a jury in Washington for trial on the morning of February 6, 1923, under indictments there found by the sovereign. The case in Washington could not have proceeded to trial without the defendant; the charge was a felony, and his personal presence before the Court and jury had been definitely ordered and was required by law.

Lewis vs. U. S., 148 U. S. 372.
Hopt vs. Utah, 110 U. S. 579.
Diaz vs. U. S., 223 U. S. 442.

The action of the Government in arresting the defendant as he was passing through New York, and thereby preventing him from being present at his trial in Washington on February 6, 1923, could not under any consideration be held to have been—

> "according to those rules and forms which have been established for the protection of rights,"

referred to in the foregoing cases, but was, on the contrary, an absolute denial of the private rights of the individual to be present at the time that his case was to be called for trial in Washington. The petitioner was not a passenger upon an intrastate train; he had not voluntarily come into the jurisdiction of New York; he had previously resisted removal proceedings to the Southern District of New York and his resistance to the removal proceedings had been successful and had resulted in his discharge in Connecticut and the exoneration of his bail. In Massachusetts the removal proceedings were still pending and were being stoutly

resisted by the defendant Benjamin W. Morse. The defendand, therefore, did not voluntarily come into the State of New York, but was merely *passing through New York en route* to Washington, pursuant to the order of Justice Stafford, by "the usual, most direct, and shortest route" thereto. He was a passenger on an interstate car and train—the Federal Express. He did not leave the train when it arrived in New York, but was asleep in his berth when arrested. The appellant, having been peremptorily ordered to appear in Washington for trial, was not voluntarily within the State of New York, but he was obliged to pass through New York in order to reach Washington, unless he had traveled by water or by an unnecessarily circuitous route. He came from his place of residence and passed through New York for the sole purpose of reaching Washington, as directed by the Court. This was necessarily "a compulsory passing through New York" and has been so held in a somewhat similar case.

U. S. vs. Bridgeman, 248 Fed. Cas. 14645, 9 Biss. 221-223, 9 Rep. 74.

This is the law of New York also.

Sander vs. Harris, 14 N. Y. Suppl. 37.
Day vs. Harris, 14 N. Y. Suppl. 73.
Murphy vs. Sweezy, 2 N. Y. Suppl. 41.

There is no parallel in the suggestion made by counsel for the Government at the argument before Judge Winslow to the effect that if a defendant passing through Ney York stepped from the train and committed a crime at the station he could be arrested in New York. Nothing of that kind occurred or is involved in any way in this case.

Not only did the Government violate the constitutional rights of the defendants to "due process of law," but the "usual mode of process" was violated.

"Usual mode of process" applies to the procedure by which the offender may be arrested and imprisoned or bailed.

U. S. vs. Powloski, 270 Fed. Rep. 285.

In *U. S. vs. Baird,* 85 Fed. Rep. 633, a witness came into the State of New Jersey in response to a subpœna from a Federal Court. While in New Jersey he was arrested on State criminal process and was immediately released by the Court upon *habeas corpus* and the arrest vacated. Judge Kirkpatrick held:

> "It is further ordered that the said John J. Boyle be safely conducted back to the City of Philadelphia in the Eastern District of Pennsylvania from whence he came; and that the marshal of the United States for the District of New Jersey attend so that he shall have safe passage to the place from whence he came."

It was further held that Boyle, having been subpœnaed by the United States to attend in New Jersey as a witness and having left Pennsylvania for that purpose, was entitled to protection from arrest by the State authorities of New Jersey for any alleged offense before then charged to have been committed by him.

How much more definite should the protection be when both proceedings are conducted by the same sovereign, as in the case at bar, where we have the sovereign in one jurisdiction directing the defendant to appear and using the summary and arbitrary power of the Government in another

jurisdiction to prevent him from appearing. It was known to the Government authorities in the Southern District of Ney York that the case of the appellant Harry F. Morse in Washington had been peremptorily set for trial for February 6, 1923, and it was known that he was *en route* to his trial. The sovereign, therefore, with full knowledge of the situation, detained and restrained the defendant in another jurisdiction, and thereby prevented his trial from proceeding and risked the forfeiture of his bail in Washington. Was this "due process of law" or was it a mere arbitrary exercise of the power of arrest without any consideration whatever for the rights of the defendant? Can this Court say that the arrest of the defendant was "orderly procedure," and that it was " in the ordinary manner prescribed by the law" and "according to those rules and forms which have been established for the protection of private rights"?

In *Chandler vs. Sherman*, 162 Fed. Rep., at page 19, it is held that—

> "A Federal Court has power to protect a litigant therein from seizure of his person by the authority of a State while in attendance upon the trial of his case."

If the power of the Federal Court could be used to protect a litigant from interference in a State Court, how much more should it be exercised in favor of a litigant in its own courts who is unfortunate enough to have proceedings brought against him by the sovereign in two jurisdictions.

Unreasonable and arbitrary exercises of power are illegal, violating the guarantee of due process of law, and persons deprived of liberty under such acts are entitled to be re-

leased by writ of *habeas corpus* issued from the proper courts of the United States.

8 *Cyc.* 1088.

In re Ash Joy, 29 Fed. Rep. 181.

In re Lee Tong, 18 Fed Rep. 253.

Again, "due process of law" is defined as—

> "Law in the regular course of administration through courts of justice."
>
> 8 *Cyc.* 1081.
>
> 2 *Kent's Commentaries* 10.

Can it be solemnly argued that the arrest of these defendants in New York in a manner which operated to prevent their attendance at the trial in Washington was "in the regular course of administration through courts of justice?" If courts of justice were to be administered in this manner throughout the United States the conditions which would ensue are so apparent as to condemn the practice without argument. Citizens accused of crime would be of all men most miserable.

The effect of the arrest in New York was to prevent the trial in the Supreme Court of the District of Columbia from proceeding at the time fixed. The regular course of administration through courts of justice required due consideration for the rights of the defendants in whichever jurisdiction the trial was appointed to be held.

Again, we have "due process of law" defined as—

> "The application of law as it exists in the fair and regular course of administrative procedure."
>
> 8 *Cyc.* 1081.
>
> 2 *Kent's Commentaries* 10.

And this was the law of Blackstone, where it is held:

> "Jurors, suitors and witnesses in attendance in a court of record are privileged from arrest."
> 3 *Blackstone's Commentaries* 289.
> 3 *Cyc.* 274.

In a South Carolina case, *Sadler vs. Bay,* 5 Rich., S. C., 523, the defendant was arrested and summoned to appear at Chester; while on his way there he was arrested on the same cause of action and summoned to appear at York, the first suit having been discontinued without his knowledge. It was held that he was privileged from arrest. (See also a Michigan case.)

Baldwin vs. Branch, 48 Mich. 525, 12 N. W. 686, where it was held that where appearance bail has been accepted from one arrested on a criminal warrant issued by a justice he cannot, pending his release on bail, be arrested in a civil *capias* upon the same matter at the suit of the same complainant. In the case at bar the sovereign is the complainant in both jurisdictions.

In *Ponzi vs. Fessenden,* 258 U. S. 260 (opinion by Chief Justice Taft), this Court had occasion to comment upon the fact that a defendant accused of crime by the sovereign cannot be in two places at the same time and inferentially condemned the Government's practice in the case at bar.

The Court held:

> "One accused of crime has a right to a full and fair trial according to the law of the Government whose sovereignty he is alleged to have offended. * * * (he) "cannot be in two places at the same time. He is entitled to be present at every stage of

the trial of himself in each jurisdiction with full opportunity for defense."

Frank vs. Mangum, 237 U. S. 309-341
Lewis vs. U. S., 146 U. S. 370.

"If that is accorded him, he cannot complain."

Harry F. Morse was, therefore, entitled to be present in Washington on the morning of the 6th day of February, 1923, when his case had been set for trial, and the action of the sovereign in subjecting him to a second arrest in New York constituted, not only a violation of his constitutional rights, but a clear interference with the proper functioning of the Washington Court.

In *King vs. Orr,* 5 U. C. Q. B. O. S. 724, it is held:

> "When a justice takes bail for an appearance at a fixed time, a second arrest by complainant for the same charge before the time appointed is illegal."

The rule in civil cases has always been:

> "Parties to civil actions while in actual attendance upon the courts, and while going to and returning from the courts, are exempt from arrest under civil process."

2.

THE SECOND ARREST OF APPELLANT UPON THE SAME BENCH WARRANT WHICH HAD BEEN USED AS THE BASIS OF THE REMOVAL PROCEEDING IN CONNECTICUT WAS ILLEGAL, AS THE BENCH WARRANT HAD SPENT ITS FORCE; WAS *functus officio,* AND THE DISCHARGE IN CONNECTICUT OPERATED LEGALLY TO DISCHARGE THE APPELLANT FROM ANY FURTHER CONFINEMENT UNDER THAT PARTICULAR PROCESS.

The bench warrant was originally issued by the District Court in New York on July 19, 1922 (fols. 49-50). It was

sent to the United States Attorney in Connecticut and made the basis of removal proceedings in that State (fols. 10-11).

On January 25, 1923, the appellant was finally and fully discharged by Judge Thomas in Connecticut and removal to New York denied. (Fols. 11-12.)

On February 5, 1923, appellant was subjected, while passing through New York, to a second arrest upon *the same bench warrant which had been previously used in Connecticut* (fols. 10-11).

This was an improper and oppressive use of the Court's process.

In *Ex parte George Milburn*, 34 U. S. (9 Peters) 704, Judge Story wrote:

> "A discharge of a party under a writ of *habeas corpus* from the process under which he is imprisoned discharges him from any further confinement under the proceeding; but not under any other process which may be issued against him under the same indictment."

A different question might be presented if a new bench warrant had been issued by the District Court in New York with knowledge of the discharge in Connecticut upon application duly made by the United States Attorney. But here we have the same process functioning in two jurisdictions and the appellant subjected to a second confinement after the first confinement had been judicially set aside.

A rearrest without any warrant or process is entirely unwarranted. If such a proceeding were tolerated, the writ of *habeas corpus* would be of no avail.

Matter of Titton, 76 Howard Prac. (N. Y.) 303.

An order of discharge other than for technical or cureable defects terminates the pending proceeding so that the person discharged cannot be further restrained thereunder or again arrested or held in custody unless a new prosecution is instituted.

In re Crandall, 59 Kansas 671.

State vs. Holm, 37 Minn. 405.

After a person has been admitted to bail, an officer has no right to rearrest him under the same process.

5 *Corpus Juris,* 437.

To authorize a rearrest, a new warrant should be issued.

Sherman vs. State, 2 Ga. A. 686, 58 S. E. 1122.

"When a party was in attendance before the district court of a county in which the crime charged was alleged to have been committed, in compliance with prior regular proceedings by which he was held by a committing magistrate to await the action of the grand jury, and before the grand jury had acted on his case or been discharged, he was again arrested on a charge of the commission of the same offense, the Court held the second arrest to be illegal."

State vs. Rilly, 109 Minn. 437, 124 N. W. 13.

"When a justice takes bail for appearance at a fixed time, a second arrest by the same complainant, for the same charge, before the time appointed is illegal."

King vs. Orr, 5 U. C. Q. B. O. S. 724.

In those cases where a second arrest has been tolerated, there has uniformly been a "new proceeding" with "new process" after discharge on the first proceeding.

In re White, 45 Fed. R. 237.

In re Collins vs. Loisel, 262 U. S. 430, there was a "new proceeding" with new affidavits after a previous discharge.

See also *Sutton vs. Butler,* 74 Misc. 251.

Hinds vs. Parker, 11 App. Div. 327.

3.

THE SUPREME COURT OF THE DISTRICT OF COLUMBIA HAD EXCLUSIVE JURISDICTION OF THE PERSON OF THE DEFENDANT BECAUSE:

1. IT HAD FIRST ACQUIRED JURISDICTION AND ADMITTED THE APPELLANT TO BAIL.

2. IT HAD NOT GIVEN CONSENT TO AN ARREST IN NEW YORK OR TO AN INTERFERENCE WITH ITS DATE FIXED FOR TRIAL.

3. THE WASHINGTON JURISDICTION HAD NOT BEEN EXHAUSTED.

The defendant having been first arrested in the District of Columbia and there admitted to bail, was legally under the exclusive control and jurisdiction of that Court, and of his bondsman.

In Exparte Johnson, 167 U. S. 120, this rule is well laid down and fully discussed. The opinion is by Justice Brown who held that if the United States Court for the Eastern District of Texas:

> "Had acquired jurisdiction it was entitled to try the defendant,"

and

> "In this connection jurisdiction of the 'case' that is the crime, is indistinguishable from jurisdiction of

the person who is charged with the crime. We know of no reason why the rule so frequently applied in cases of conflicting jurisdiction between Federal and State Courts should not determine this question. Ever since the case of Ableman vs. Booth, 21 How. 506, it has been the settled doctrine of this Court that a Court having possession of a person or property cannot be deprived of the right to deal with such person or property until its jurisdiction is exhausted and that no other Court has the right to acquire such custody or possession."

15 *Corpus Juris,* 1166;
Chandler vs. Sherman, 162 Fed. 19;
Daret vs. Duncan, 4 Fed. Cases No. 581;
Sadlier vs. Fallen, 21 Fed. Cases No. 12209;
Peo. vs. Sage, 11 A. D. 4.

In *U. S. vs. Marrin,* 227 Fed. Rep., 314, 318, the Court said:

"If a person be answerable to two different jurisdictions for offenses against the laws of each it is a physical fact that he cannot be at the same time in the control of each. It is, therefore, necessary that one give way to the other for the time being. It is convenient and desirable that there be a rule by which it can be determined which authority shall make way for the other. This rule is that known as the rule of comity. It answers with Courts and cabinets, in law and in diplomacy substantially the same purpose which personal courtesies serve in the social relations of life. *One of the principles is that the court which first asserted jurisdiction may continue its assertion without interference from the other.*"

The Washington Court having been the Court in which the defendant was first indicted and in which he was first

admitted to bail, had exclusive jurisdiction at the time of the second illegal arrest in New York to proceed to trial on February 6, 1923, the time appointed, without interference from the representative of the sovereign in New York—the United States Attorney for the Southern District of New York.

> "The tribunal which first gets jurisdiction holds it to the exclusion of the others until its duty is fully performed and the jurisdiction invoked is exhausted; and the same rule applies alike in both civil and criminal causes. The removal of a person by a court of competent jurisdiction beyond the control of his bondsmen, thus rendering them unable to produce the person at the time and place set for trial as undertaken by the condition of his bond, is in the language of the authorities 'an act of law' and can be set up in defense to a suit on the bond."
>
> *In re James*, 18 Fed Rep. 583.

> "A court which has in its custody a person charged with a crime has exclusive custody and jurisdiction until the question of his guilt or innocence is determined; and a person arrested on a Commissioner's warrant and either in custody, or held to bail pending his examination for removal to another district in answer to a criminal charge *is not subject to a second arrest* for removal to a different district until the first proceeding has been terminated."
>
> *In re Beavers*, 125 Fed. Rep. 988.

See, also,

Ponzi vs. Fessenden, 258 U. S. at p. 260.
Covell vs. Heyman, 111 U. S. 176.
McCauley vs. McCauley, 202 Fed. R. 280-284.
State vs. Chimault, 55 Kans. 326.
Ex parte Earley, 3 Ohio Dec. 105.

Commonwealth vs. Fuller, 8 Minn. 318.
Hill Mnfg. Co. vs. Providence & N. Y. S. S. Co., 113 Mass. 495.
Ayers vs. Farrell, 196 Mass. 350.
Wayman vs. Southard, 10 Wheat. 1.
Taylor vs. Taintor, 16 Wall. 366.
Felts vs. Murphy, 201 U. S. 123.
Harkvader vs. Wadley, 172 U. S. 163.
In re Johnson, 167 U. S. 120.
Opinion of the Justices, 201 Mass. 607.

In the case at bar the United States is "the common sovereign" and also "the common accuser." The Washington Court which first acquired jurisdiction had never given consent to arrest in the Southern District of New York; nor is any consent shown in the moving papers so that the arrest in the Southern District of New York created a condition which necessarily conflicted with and disturbed the due administration of justice in the Washington Courts. This was referred to by Judge Brandeis in Stallings *vs.* Splain, 253 U. S. 342, where he says:

> "The question would merely have been whether a second arrest properly could be made when it conflicted with the first."

By the arrest in New York the defendant was deprived of his Constitutional rights to a speedy trial in the District of Columbia, and by the same sovereign.

Beavers vs. Haubert, 198 U. S. 85.

The sovereignty of the United States had first attached its jurisdiction in Washington and had not been asked to yield it.

In *Peckham vs. Henkel,* 216 U. S. 482, it is held:

> "The present case differs upon this point from that of Beavers *vs.* Haubert, in that *the consent of the court of prior jurisdiction* was not obtained as in that. In that case the court reversed the question as to 'whether the Government had the right of election *without such consent*' to proceed in either of two districts in which indictments were pending."

In extradition cases there is immunity from a second arrest.

In re Baruch, 41 Fed. Rep. 472.

4.

THE DEFENDANT HAVING BEEN ADMITTED TO BAIL IN WASHINGTON WAS ALSO LEGALLY IN THE CUSTODY OF HIS BONDSMAN AS HE PASSED THROUGH NEW YORK ON THE SLEEPING CAR AND WAS IN A LEGAL SENSE AS MUCH UNDER ARREST AS IF ACTUALLY CONFINED.

The general rule is as stated by Mr. Justice Wayne in *Taylor vs. Taintor,* 16 Wall. 371—a leading case.

> "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of his original imprisonment."

See also, *In re Beavers,* 125 Fed. 988, affirmed 194 U. S. 73.

A person while held to bail in one court is not subject to arrest under an indictment in another court, particularly without the consent of the first Court.

(Same cases as last above cited) and also:

Hernandez vs. Camobell, 11 N. Y. Superior Court, 642.

10 *Howard's Practice,* 433.

5.

THE ARREST IN NEW YORK CONFLICTED WITH THE WASHINGTON JURISDICTION AND VIOLATED THE PRINCIPLE OF JUDICIAL COMITY.

The case in Washington before Mr. Justice Stafford could not proceed unless the defendant was personally present; and he could not be present because on the very midnight before his trial he was arrested and detained by the United States, the common accuser, in the Southern District of New York. This was wholly subversive of the principle of judicial comity, which is defined as:

> "The principle in accordance with which the course of one State or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect."
>
> *Mast vs. Stover Mnfg. Co.*, 177 U. S. 485.

Had the Supreme Court in the District of Columbia been requested to consent to the arrest in New York a different state of facts would be here presented.

250 U. S. 283:

> "Comity * * * is not a rule of law but a rule of practice, convenience, and expediency."
>
> *Watts vs. Unione Austriaca di Navigaziona*, 224 Fed. Rep. 188-192.

In the *Marrin case*, 227 Fed. Rep. at page 317, it is held:

> "It is too clear for necessity of citing supporting authorities that any court has the power to assert its jurisdiction and in the legal sense preserve its dignity

by preventing the interference of any other authority with the work which that court had in hand to do."

"*In the enforcement of this principle courts will relieve from arrest and even* from the service of civil process on witnesses who are in attendance upon the business of the court. In recognition of the same principle no court will direct the services of its process upon persons who are thus in attendance upon another court."

This Court will observe the application of the facts of the case at bar as applied to the rule of law above laid down. The defendant being actually in the custody of his bondsman in the Washington jurisdiction was actually in that jurisdiction, in the legal sense, and being *en route* to his trial was not subject to a second arrest in the Southern District of New York, particularly upon a bench warrant upon which removal to New York had been denied. In recognition and enforcement of the great principle of judicial comity, and in order to preserve the due and orderly administration of justice and the application of the Constitutional right of due process of law, the District Court should have relieved from the wholly arbitrary and illegal second arrest by vacating the same upon the appellant's application by *habeas corpus*.

This is not a case where a defendant was unlawfully abducted or kidnapped, from one State, or one jurisdiction, to another, or where he is fraudulently brought into the jurisdiction, or where he has voluntarily come into the jurisdiction; it is a case of a defendant duly admitted to bail in another jurisdiction and *en route* to his trial, being arrested upon an old bench warrant which had wholly spent its force and from the effect of which he had been previously discharged in the State of Connecticut by a Federal Judge.

It is submitted that the facts of this case are wholly different from any case recorded in the books. There is no precedent anywhere which would authorize or justify the second arrest which the Federal authorities perpetrated in the Southern District of New York upon this petitioner in the arbitrary, high-handed and wholly illegal manner disclosed by this record.

This case stands wholly by itself as a concrete example of the oppressive tactics of certain Government officials and the arbitrary exercise of the great power of the United States contrary to the due process clause of the Constitution and to all of the great legal principles sanctioned by the Courts for the protection of the citizen and the orderly and dignified administration of justice. It was an entire disregard of the decision of Judge Thomas and of the order of Judge Stafford that the trial in his Court should proceed on the day fixed by him, and of all of the principles of due process of law and judicial comity.

6.

THE DECISION OF UNITED STATES JUDGE THOMAS IN CONNECTICUT DISCHARGING THE APPELLANT IN HABEAS CORPUS PROCEEDINGS AND DENYING THE GOVERNMENT'S APPLICATION FOR HIS REMOVAL WAS CONCLUSIVE IN APPELLANT'S FAVOR AS ESTABLISHING THAT HE WAS ILLEGALLY HELD IN CUSTODY AND WAS RES JUDICATA OF ALL ISSUES OF LAW AND FACT NECESSARILY INVOLVED IN THAT RESULT. SUCH DECISION COULD NOT BE ARBITRARILY DISREGARDED BY THE UNITED STATES, NO APPEAL HAVING BEEN TAKEN THEREFROM.

One of the questions "necessarily involved" in Judge Thomas' decision was that the bench warrant issued in New

York for appellant's arrest was illegally issued. This holding the Government officials set at naught and wholly defied by using the same bench warrant for a second arrest and subjecting appellant to a "second confinement" thereunder.

The Government had instituted removal proceedings in Connecticut against appellant Harry F. Morse, and such proceedings were had in that jurisdiction that Judge Thomas held that the indictment in the Southern District of New York upon which the arrest was made did not charge the defendants with the commission of a Federal offense. The opinion of Judge Thomas is printed in the record (Fols. 33-49) herein and is referred to for the full detail of the conclusions there reached.

It is submitted that the question of whether the indictment charged an offense under Federal laws was *a question of substantive law,* and where a matter is decided as one of substantive law it is conclusive upon the Government until reversed upon appeal. There was no technicality involved in the decision of Judge Thomas. It was a broad holding that the New York indictment charged no offense whatsoever.

It must be admitted that the legal sufficiency of the indictment raised a question of substantive law, and this question was submitted to Judge Thomas both by the defendant and by the Government, argued at length, and briefs submitted. Judge Thomas held that the indictment was bad, that it did not charge the commission of a Federal offense, and discharged the defendant. This then became the *law of the case* until reversed on appeal. It could not be arbitrarily disregarded by the Government, as it was in the instant case by a second arrest in New York.

The arrest in New York not only violated the principle of judicial comity, as related to the Washington jurisdiction, but also wholly violated, disregarded and set for naught the decision of Judge Thomas in the Connecticut jurisdiction.

Is it possible that the Government can submit its rights in removal proceedings to a Federal Judge in Connecticut and then when the question is decided against it wholly disregard the decision, and without an appeal arrest the defendant upon the original bench warrant when he is merely passing through the jurisdiction of New York en route to his trial in the District of Columbia?

Every principle of judicial comity—due process of law—regard for the proper forms of orderly procedure, requires that the decision of Judge Thomas should stand as the controlling law of the case until reversed. The decision of a Federal judge having jurisdiction of the subject-matter and the person of a defendant, that the indictment did not charge an offense under Federal laws is, we submit, just as much a decision upon the merits of that phase of the controversy as in the *Oppenheimer case,* 242 U. S. 85, wherein Judge Holmes wrote:

> "Of course the quashing of a bad indictment is no bar to a prosecution upon a good one; but a judgment for the defendant upon the ground that the prosecution is barred goes to his liability as matter of substantive law and one judgment that he is free as matter of substantive law is as good as another."

Even the decision of a United States Commissioner, while not given the dignity of res-judicata has been held to be conclusive. It is held in

U. S. vs. Hoa, 167 Fed. Rep. 211

that:

> "The decision of the United States Commissioner refusing to commit a prisoner for removal to another Federal district for trial of a criminal charge does not render the question of the right to such removal *res judicata*, but ordinarily in the absence of special circumstances *it should be held conclusive on the same facts.*"

See also:

Palmer vs. Thompson, 20 App. D. C. 273.
29 *Corpus Juris* 178.
Palmer vs. Colladay, 18 App. D. C. 426.
Targun vs. Bean, 109 Me. 189.
McConologues Case, 107 Mass. 154.
Exparte Hamilton, 65 Miss. 98.
Exparte Jilz, 64 Mo. 205.
Yates vs. People, 6 Johns 337.
In re Crow, 60 Wis. 349.

In *Horn vs. Mitchell*, 223 Fed. Rep., 550, it is held that:

> "When an order is made by a judicial officer of one Federal district having authority to act for the removal of a person arrested in that district to another where he is charged with crime, and the order is regular on its face and was based on proceedings of which the Court had jurisdiction it may not be reviewed by the Court in the latter district in *habeas corpus* proceedings."

An order of judgment discharging a person in *habeas corpus* proceedings is conclusive in his favor that he is illegally held in custody and is *res judicata* of all issues of law and fact necessarily involved in that result.

Judge Thomas concededly had jurisdiction of the person of the defendant Harry F. Morse; he had jurisdiction of the case; and the Government submitted its rights when it asked Judge Thomas to issue a warrant of removal to the Southern District of New York.

In the *habeas corpus* proceeding before Judge Winslow based upon the second arrest, Judge Winslow was in effect asked by the Government to review, or sit in appeal upon, the decision of Judge Thomas, and not to give it any effect whatsoever. If Judge Thomas was right and the indictment here does not charge an offense, then the defendant ought not to have been held in any event. Could Judge Winslow say upon the argument before him that the decision of Judge Thomas was wrong; or should the decision upon that matter in the orderly course of judicial procedure have been left to the Circuit Court of Appeals upon appeal by the Government?

Was Judge Winslow authorized to wholly disregard the decision of a District Judge of concurrent authority and jurisdiction upon a question of law and arbitrarily set it aside, or should it have been held that due process of law required the Government to appeal from the decision of Judge Thomas and that until reversed upon appeal such decision was the law of this case?

> "When an order is made in one federal district, by a judicial officer having authority to act, for the removal of a person arrested in that district to another when he is charged with crime, such order, if regular on its face, and based on proceedings of

which the Court has jurisdiction, will not be reviewed on *habeas corpus* in the second district."

Horn vs. Mitchell, 223 Fed. R. 549; aff. 232 Fed. R. 879.

U. S. vs. Robinson, 126 Fed. R. 1016.

Every principle of judicial comity and due process of law required that this second arrest should have been vacated and the Government remitted to its right to appeal from the decision of Judge Thomas in the Connecticut District.

See also:

Williams vs. State, 83 S. K. 790; 169 Ind. 384;

U. S. vs. Chungshee, 71 Fed. Rep. 279.

Freeman on Judgments, Section 324, sustains this view in the following language:

> "If, on the other hand, the prisoner is discharged from custody this is an adjudication that at that time he was entitled to his liberty and is conclusive in his favor should he be again arrested unless some authority can be shown for holding him which did not exist at the time of his discharge."

And in *Church on Habeas Corpus,* Section 386, I find:

> "Again it has been held that in proceedings upon *habeas corpus* the determination of the Court upon the facts has the effect of a verdict of a jury."
>
> *Bonnett vs. Bonnett,* 61 Iowa 199; 16 N. W. 91.

Indeed, the authorities, without exception, seem to hold that when a person has been discharged upon *habeas corpus*

all issues of law and fact necessarily involved are *res judicata* and the person so discharged cannot for the same cause be "lawfully rearrested" upon the same process. Such in effect was the ruling of this Court in *Collins vs. Loisel,* 262 U. S. 430.

In the Connecticut proceeding all of the facts before the Commissioner, together with the indictment, were before Judge Thomas upon the question of probable cause and the decision of Judge Thomas found that upon these facts the allegations of the indictment could not be sustained; and that the indictment is defective as matter of law.

We submit that this decision should have a conclusive effect until reversed. See also:

Sutton vs. Butler, 74 Misc. 251; 76 Fed. Rep. 951; 133 N. Y. Supp. 936; 66 A. D. 327; 42 N. Y. Supp. 955.

Hinds vs. Parker, 11 A. D. 327.

These cases last cited hold in substance that:

> "A person discharged from custody on *habeas corpus* may not lawfully be arrested again for the same cause."
>
> "An order discharging a person in *habeas corpus* proceedings made by a court possessing jurisdiction has a binding force and effect upon all parties concerned."

7.

THE WRIT OF HABEAS CORPUS SHOULD HAVE BEEN SUSTAINED, THE ARREST OF THE DEFENDANT VACATED, AND THE DEFENDANT DISCHARGED.

A summary of the facts and law of this case will disclose the very unusual situation presented to the Court for decision. If the position of the Government is sustained this Court is also asked to set at naught the decision of Judge Thomas and to hold that defendants in a criminal suit discharged in one jurisdiction by a Federal Judge after a full consolidated hearing upon *habeas corpus* and removal proceedings and in the custody of their bondsmen for appearance in another Federal jurisdiction and actually necessarily en route to that jurisdiction for trial may be summarily detained in the jurisdiction to which the Government's right of removal had been denied, and upon an indictment which had been held not to charge a criminal offense, all in violation of every principle of judicial comity, in violation of the right of the Washington bondsman to produce the appellant before the Court for trial, and in violation of the orderly and due processes of the law, and of every principle of fairness in the administration of justice. This Court is dealing with the actions of the representatives of the Federal Government, which Government in the instant case is both sovereign and accuser, with one hand pulling the defendant into court for trial and with the other hand forcibly holding him so that he could not appear. An anomalous and wholly unusual situation is here created which it is not believed that this Court will sanction. The decision of Judge

Thomas should have been held conclusive upon the same process until reviewed and reversed upon appeal and the Court of Judge Stafford in the District of Columbia should have been accorded full respect by the representatives of the Government.

The facts set out in the petition and supplementary affidavits of the appellant were not denied, and it is respectfully submitted that the writ of *habeas corpus* should have been sustained and the defendant discharged from custody.

NASH ROCKWOOD,
Attorney for the Defendant, Harry F. Morse, 527 Fifth Avenue, Borough of Manhattan, New York City.

CHARLES T. LARK,
Of Counsel.

DECEMBER 1, 1924.

In the Supreme Court of the United States

OCTOBER TERM, 1924

BENJAMIN W. MORSE, APPELLANT
v.
THE UNITED STATES
No. 597

HARRY F. MORSE, APPELLANT
v.
THE UNITED STATES
No. 598

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF THE UNITED STATES

STATEMENT

The two appellants, with several others, were jointly indicted in the Southern District of New York for conspiring to use the mails to execute a scheme to defraud. (Secs. 37 and 215, Criminal Code.) Both appellants were apprehended in that district after contesting removal proceedings instituted in Massachusetts against Benjamin W. Morse (appellant in No. 597) and in Connecticut against

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Harry F. Morse (appellant in No. 598). They applied to the District Court for writs of habeas corpus, which were granted. At the subsequent hearing, however, the writs were dismissed; and from the orders of dismissal these appeals were taken. The District Judge, in allowing the appeals, issued a supersedeas on the express condition that every effort be made to expedite the hearing of the appeals, in order that the trial of the main cause should not be unduly delayed.

Both appeals involve substantially the same facts and raise identical questions of law. On motion of the United States, this Court, on October 27th, 1924, ordered them consolidated and advanced.

These appeals have been brought direct to this Court under Section 238 of the Judicial Code, on the ground, apparently, that the cases involve "the construction or application of the Constitution of the United States."

A careful examination of the record, however, will show not only that it presents no constitutional question of any sort, but also that the appeals are altogether without merit and should be dismissed. The petitions for habeas corpus do not mention the Constitution at all. But the appellants seek to inject a constitutional question by means of general allegations, contained in their affidavits filed in support of the petitions, to the effect that their arrest and detention are contrary to due process of law. These allegations were carefully considered by the District Court and were held to be without merit.

ARGUMENT

I

The appellants claim that they were privileged from arrest while passing through the Southern District of New York en route to the District of Columbia, where they were to stand trial on an indictment for another offense (conspiracy to defraud the United States, Rec. Tr. pp. 3–4).

Suitors and witnesses are, under certain circumstances, privileged from arrest in *civil* proceedings; and the privilege protects them *eundo, morando, et redeundo*. But there is no corresponding protection from arrest in *criminal* proceedings. Every person found within the territorial limits of a jurisdiction (whether those limits be the boundaries of a state or of a Federal district) is amenable to criminal process from the courts of that jurisdiction, regardless of how or why he comes thither. To this rule there are a few well-defined exceptions. One is to be found in the immunity conferred by international law upon foreign sovereigns and diplomatic officers; another, in the right of a person lawfully extradited for one crime to be tried for that crime only and not for another. *United States* v. *Rauscher*, 119 U. S. 407. With these exceptions, at the trial of a criminal case, the court will never stop to consider the manner in which the prisoner is brought before it. He may have been kidnapped or brought within the jurisdiction by a trick. But such circumstances will not entitle him either to an acquittal or to a favorable

judgment on direct appeal. Neither will they entitle him to a discharge upon habeas corpus, either before or after trial.

Pettibone v. *Nichols*, 203 U. S. 192.
Mahon v. *Justice*, 127 U. S. 700.
Ker v. *Illinois*, 119 U. S. 436.
People v. *Rowe*, 4 Parker Cr. (N. Y.) 253.
Dows' Case, 18 Pa. St. 37.
ex parte Scott, 9 B. & C. 446.

The present case can not be distingished on the ground that the appellants had already been indicted in the District of Columbia, that they had been admitted to bail there, or that they were actually proceeding thither to stand trial when they were arrested. There is no rule of comity which prevents the United States from prosecuting a defendant in one district merely because he has already been indicted in another. *Peckham* v. *Henkel*, 216 U. S. 482. The fact that the appellants had been admitted to bail in the District of Columbia or that their case had been set for trial there does not place them in the actual custody of the Supreme Court of that District, or prevent other courts from acquiring jurisdiction of their persons and punishing them for crimes committed elsewhere. To hold otherwise would mean that a person charged, for example, with larceny in New Jersey, and admitted to bail there, would be at liberty to commit murder in New York and arson in Massachusetts and yet avoid punishment. Neither New York nor Massachusetts could arrest or try him so long as the New Jersey indictment was out-

standing. Or again, a person might commit murder in New York and might then at once flee into New Jersey and procure his own arrest and indictment there for some minor offense. Having been admitted to bail in New Jersey, he could then return to New York, where he would be able to postpone his trial for murder for just so long a time as he could induce the New Jersey prosecutor to delay action on the minor charge.

Such reasoning is absurd. Admission to bail in one jurisdiction, even coupled with the fact that trial is about to be held there, confers no immunity from arrest or prosecution in another. The appellants in this case were permitted by their sureties to leave the District of Columbia and to travel at large in the United States. They were free to come and go; but this does not mean that they were privileged from arrest wherever they might be found. Moreover, this is not an action on the bail bond in the District of Columbia. In such an action the sureties might or might not be entitled to relief; but the appellants themselves cannot now complain. Being accused of different crimes in different districts, they can not elect where they are to be tried first or rely upon bail or upon a pending trial in one district as conferring immunity from arrest in another.

Peckham v. *Henkel*, 216 U. S. 482.
Haas v. *Henkel*, 216 U. S. 462.
Taylor v. *Taintor*, 16 Wall. 366.
Ex parte Marrin, 164 Fed. 631.
In re Fox, 51 Fed. 427.

II

It is also contended that the decision of the United States Commissioner in Massachusetts and of the District Court in Connecticut in favor of the appellants on removal proceedings establish the insufficiency of the indictment and bar the United States from proceeding further against them in the Southern District of New York. There is no reasonable basis for this contention. A decision in removal proceedings is not in any sense *res adjudicata* and does not bar further proceedings arising out of the same cause, nor is the accused put in jeopardy. He may be committed a second time upon a complaint charging the same offense in identical form. If he is subsequently apprehended in the district to which it was sought to remove him, he may be lawfully tried there, notwithstanding the failure of the removal proceedings.

Collins v. *Loisel*, 262 U. S. 426.
Bassing v. *Cady*, 208 U. S. 386, 391.
Commonwealth v. *Sullivan*, 156 Mass. 487.
People v. *Dillon*, 197 N. Y. 254.

The writ of habeas corpus can not be made to perform the functions of a writ of error after conviction; nor can it be used to release a prisoner in advance of trial, merely because the indictment may be inartificially drawn. The construction and interpretation of the indictment are for the trial court alone. They are not proper matters of inquiry on habeas corpus. The ruling of the District Court for the Southern District of New York was correct on

this point. And that Court was in no sense bound by the prior adjudications of the District Court in Connecticut and of the Commissioner in Massachusetts.

Glasgow v. *Moyer*, 225 U. S. 420.
Matter of Gregory, 219 U. S. 210.
Hyde v. *Shine*, 199 U. S. 62.
Benson v. *Henkel*, 198 U. S. 1.
Benson v. *Palmer*, 31 App. D. C. 561.

III

The appellants further argue that the bench warrant under which they were arrested was void at the time of the arrest, and that it therefore furnishes no justification for their detention. They contend that the same bench warrant (or a copy of it) had been used as the basis of the removal proceedings in Massachusetts and Connecticut, and that upon the termination of the removal proceedings the force of the warrant was spent.

This argument can not be sustained. It is true that under certain circumstances a warrant may lose its force when a return is made. But the record herein does not show that any return was ever made. On the contrary, it discloses that the warrant was still in the hands of the Marshal for the Southern District of New York, and that the Marshal executed it by arresting the appellants within that District.

The fact that a judge or commissioner in another District had previously decided against the Government in removal or habeas corpus proceedings can-

not operateas a binding decision on the invalidity of the indictment; neither can it operate to discharge a bench warrant which is based upon the indictment. That warrant and indictment did not and could not constitute the *process* under which the appellants were arrested in Massachusetts and Connecticut. They constituted merely the *evidence* upon which an application for removal might be made. The warrant was returnable before the District Court which had issued it. Its purpose was to compel the appellants to answer to the indictment there found against them. Its force was not spent by the removal proceedings. It continued in force until it had been returned to the Court which issued it, and until the appellants had been brought thither.

Bassing v. *Cady*, 208 U. S. 386.
Greene v. *Henkel*, 183 U. S. 249.
Benson v. *Palmer*, 31 App. D. C. 561.

IV

It is apparent then that this appeal raises no constitutional questions, and so can not be maintained in this Court.

Didato v. *Hecht*, in this Court, Nov. 24th, 1924.
Heitler v. *United States*, 260 U. S. 438.
Childers v. *McClaughry*, 216 U. S. 139.

Under the Act of September 14, 1922 (42 Stat. L. 837, Judicial Code, S. 238 a.), this Court has the power to transfer the appeal to the Circuit Court of Appeals, instead of dismissing it. This was done in

the cases of *Didato* v. *Hecht* and *Heitler* v. *United States, supra.*

It is respectfully submitted, however, that in the present case no order of transfer should be made. The appeals should instead be dismissed.

It is now nearly three years since the appellants were indicted in the Southern District of New York. A supersedeas was granted by the District Court in the present appeals on the express condition that the appeals should be expedited.

If the appeals are now transferred to the Circuit Court of Appeals, further delays will ensue in the trial of the main case against the appellants and the others who have been indicted with them. The points raised by the appellants are frivolous, and are in no event open on habeas corpus. They are, without exception, questions which are proper for the trial court alone, or, after conviction, for an appellate court on writ of error; and the Circuit Court of Appeals, if the cases were now transferred to it, would undoubtedly so hold.

This court possesses the power to dismiss an appeal instead of transferring it. The power has not been abridged by the enactment of S. 238-a of the Judicial Code, for that section merely provides that where an appeal has been taken to the wrong court it shall not "*for such reason*" be dismissed. The purpose of the Section was to benefit litigants whose appeals raised questions which were arguable in *some* court, but who had mistakenly chosen the wrong court. But in the present case the points

raised by the appellants can not be argued on habeas corpus either here or in the Circuit Court of Appeals; and an order of transfer would achieve no useful result, but would serve rather to delay still further the trial of the main issue. An order of dismissal should be made, notwithstanding S. 238–a, wherever this Court is of opinion that an appeal is groundless, frivolous, or vexatious, or where it is intentionally taken to the wrong court for purposes of delay, or where it can not be maintained in any court at the existing stage of the proceedings.

V

The points raised by both appellants are without merit. They involve no constitutional questions, and so can not be argued in this Court. They involve no questions which are open on habeas corpus and so can not be argued in the Circuit Court of Appeals. It is therefore respectfully submitted that both of these appeals should be dismissed.

JAMES M. BECK,
Solicitor General.

WILLIAM J. DONOVAN,
Assistant Attorney General.

JANUARY, 1925.

O

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1924.

JOHN MULLEN, ANDREW WYTOW, VALENTINE PISARSKI, JENNIE MILLER, MATT BUCONICH, JOE LAMONT, LEWIS L. CAHN and VITO SCHIRALLI,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

No. 837

Petition and Brief for Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

C. B. TINKHAM,
Attorney for Petitioners.

A. E. TINKHAM,
F. R. MURRAY,
Of Counsel.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1924.

JOHN MULLEN, ANDREW WYTOW, VALENTINE PISARSKI, JENNIE MILLER, MATT BUCONICH, JOE LAMONT, LEWIS L. CAHN and VITO SCHIRALLI,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

No. .....

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, John Mullen, Andrew Wytow, Valentine Pisarski, Jennie Miller, Matt Buconich, Joe Lamont, Lewis L. Cahn and Vito Schiralli, respectfully represent that they were among seventy-four persons indicted on the 13th day of January, 1923, in the District Court for the District of Indiana, upon four counts, each charging conspiracy to commit an offense against the United States in violation of the National Prohibition Act. The first count charges conspiracy to transport intoxicating liquor; the second count, conspiracy to sell intoxicating liquor; the third count, conspiracy to maintain common nuisances, to-wit: places where intoxicating liquors were to be manuafctured, sold, kept and bartered for beverage

purposes; the fourth count, conspiracy to manufacture, transport, sell, possess for sale, and barter, intoxicating liquors. (Tr., 1 to 21.)

Sixty-three of these defendants, including your petitioners, plead not guilty, and fifty-five of them, including your petitioners, were found guilty by the jury. One of these was granted a new trial and later discharged, and two were discharged on Motion in Arrest. (Tr., 68.) The remaining fifty-two defendants were sentenced by the court, and your petitioners received the following sentences:

John Mullen	3 months	no fine
Andrew Wytow	6 months	$500.00
Valentine Pisarski	4 months	100.00
Jennie Miller	3 months	100.00
Matt Buconich	4 months	100.00
Joe Lamont	4 months	100.00
Lewis L. Cahn	4 months	100.00
Vito Schiralli	4 months	100.00

(Tr., 80.)

All of the defendants so sentenced lived in the City of Gary, Lake County, Indiana. Your petitioners John Mullen and Andrew Wytow were police officers of said city. The remainder of your petitioners were, at some time during the period covered by the indictment, operators of so-called soft drink parlors in said city.

Writs of error were taken out by each of your petitioners, and it was ordered by the court on stipulation between the plaintiffs in error and the United States attorney that the entire record as to all of said plaintiffs in error be included in one transcript, and that each of said plaintiffs in error be permitted to be heard in the Circuit Court of Appeals for the Seventh Circuit on the transcript so prepared. (Tr., 83 to 86.)

Before the beginning of the trial in the District Court your petitioners filed written motion for a continuance

of the trial of said cause, which motion was based upon the publication in the leading newspapers of Indianapolis, and elsewhere over the district, of interviews given out by the United States attorney on the day before and on the same day the trial began (Tr., 90), which motion was by the court overruled, to which ruling exception was duly taken. (Tr., 102.)

Your petitioners also filed before the beginning of the trial a written motion to discharge the panel, which motion was based on the same grounds as the motion for continuance (Tr., 103), such motion was by the court overruled, to which ruling exception was duly taken. (Tr., 115.)

At the close of all of the evidence, your petitioners separately moved the court to direct the jury to find each not guilty, the ground of which motions was that the evidence was insufficient to support a conviction. The court overruled such motions, and your petitioners duly excepted thereto. (Tr., 1119.)

The above alleged errors were duly assigned in the various assignments of error filed by your petitioners. (Tr., 1337, 1346 and 1353.)

For convenience, your petitioners may be divided into two groups or classes, as follows:

1. John Mullen and Andrew Wytow, police officers of the City of Gary.

2. Valentine Pisarski, Jennie Miller, Matt Buconich, Joe Lamont, Lewis J. Cahn and Vito Schiralli, each of whom at some time during the period covered by the indictment, operated so-called soft drink parlors in the City of Gary.

The following are references to the facts concerning each of your petitioners as disclosed by the evidence:

JOHN MULLEN

GOVERNMENT'S EVIDENCE.

Oscar L. Sprague, Transcript p. 334.
James E. McPherson, Transcript p. 336.
William H. Matthews, Transcript p. 237.

EVIDENCE ON HIS OWN BEHALF.

John Mullen, Transcript pp. 362 to 365.

ANDREW WYTOW

GOVERNMENT'S EVIDENCE.

Horace Lyle, Transcript p. 321.
Olaf Schonhult, Transcript p. 385.
William Hays, Transcript p. 407.
Mary Gibbs, Transcript p. 431.
Aleck Mouroutis, Transcript p. 433.

EVIDENCE ON HIS OWN BEHALF.

Andrew Wytow, Transcript pp. 865 to 869.

VALENTINE PISARSKI

GOVERNMENT'S EVIDENCE.

Roy Wright, Transcript pp. 271, 272 and 274.
William E. Hindel, Transcript p. 436.
Fred T. Davenport, Transcript p. 441.

No evidence introduced in behalf of the petitioner.

JENNIE MILLER

GOVERNMENT'S EVIDENCE.

Harold Cross, Transcript p. 245.
Roy McVey, Transcript p. 255.
Roy Wright, Transcript pp. 266 to 275.

No evidence introduced in behalf of the petitioner.

Matt Buconich

GOVERNMENT'S EVIDENCE.

Roy Wright, Transcript p. 274.
Exhibit 13e, Transcript p. 518.

No evidence introduced in behalf of the petitioner.

Joe Lamont

GOVERNMENT'S EVIDENCE.

Harold Cross, Transcript pp. 244 and 245.
Louis Wien, Jr., Transcript p. 258.
Roy Wright, Transcript p. 267.
Exhibit 21, Transcript p. 299.
Olaf Schonhult, Transcript p. 384.
I. A. Horner, Transcript p. 440.

No evidence introduced in behalf of the petitioner.

Lewis L. Cahn

GOVERNMENT'S EVIDENCE.

Louis Wine, Jr., Transcript pp. 258 and 259.
James G. Browning, Transcript pp. 315 and 316.
Philip Ukman, Transcript pp. 447 and 448.
Roy Wright, Transcript pp. 263 and 264.
Olaf Schonhult, Transcript p. 385.
I. A. Horner, Transcript p. 440.

No evidence introduced in behalf of the petitioner.

Vito Schiralli

GOVERNMENT'S EVIDENCE.

Roy Wright, Transcript p. 269.
Horace Lyle, Transcript p. 321.

No evidence introduced in behalf of this petitioner.

Your petitioners urge the following questions of law:

I.

The inevitable prejudice created by the highly inflammable interviews given out by the district attorney and published in various leading newspapers in the City of Indianapolis, and elsewhere in the district, on the day before the trial began and on the day the jury was sworn to try the cause and also during the trial, which question was raised by the motion for continuance and the motion to discharge the panel hereinbefore mentioned. (Tr., 90 and 103.)

II.

The impossibility of a fair and impartial trial with such an unprecedented number of parties defendant—an agglomeration of defendants which could only mean confusion and a fatal obstacle to a properly considered verdict, even in the absence of the above alleged prejudice.

III.

The unlawful inferences necessarily drawn by the jury in order to arrive at a verdict of guilty, which question was presented to the trial court by motions of your petitioners at the close of all the evidence to direct a verdict for them. (Tr., 1119.)

IV.

The position of the Circuit Court of Appeals, as disclosed in its opinion, that it will not consider any distinction between "evidence" and "substantial evidence." (Tr., p. 1416.) This is not in conformity with decisions rendered in other Circuits, and in the interest of uniformity of decision on this important subject, this question should be considered.

Considering the questions above urged in consecutive order, we first take up the alleged prejudice of the jury on account of the publication of the interviews given out by the district attorney who had charge of the prosecution for the government.

Point I.

This question was raised in the trial court, first, by a motion for continuance, and second, by a motion to discharge the panel, the published interviews being the grounds for both motions. (Tr., 90 to 115.) Excerpts from these newspaper articles also appear in a note to the opinion handed down by the Circuit Court of Appeals. (Tr., 1426.)

The Circuit Court of Appeals, in its opinion, declares that this is the most serious question in the case, and in this connection uses the following language:

> "The most serious assignment of error—one in which all defendants join—arises out of the publication of certain newspaper articles. While the court was engaged in the trial of the case, newspapers of Indianapolis, following an altogether too common practice, also tried the case, acting as investigator, prosecutor and judge. Whether the verdict following the long trial shall now be set aside and a new trial ordered, and the large expense to the government and defendants duplicated, depends upon our conclusion respecting the effect of these newspaper articles." (Tr., 1425 and 1426.)

It is not infrequently the case that where causes of action of more or less prominence come on for trial, comments may be found in the public press purporting to disclose some of the facts involved; **but never before in the history of trials can we find that the public prosecutor has directly charged in public interviews on the eve of trial that the defendants have been guilty of mur-**

dering the chief witness for the prosecution in order to still his accusing tongue.

The unique feature here is that this grave charge was hurled at these defendants by the *district attorney* whose opportunities are unsurpassed for procuring information, the accuracy of which is usually accepted by the general public. Are not the following words startling when coming from the district attorney in charge of the prosecution on the day before the trial and on the day the trial began and afterward?

> "I am not surprised that Monte has been killed, and have been expecting to hear of just such violence. * * * The action only bears out my belief that the Lake County defendants are a desperate bunch, and that the government must not spare any pains to safeguard the witnesses and agents who are connected with the case which comes up for trial Wednesday morning before Judge Geiger."

These words are by no means all that he was quoted as saying, but they form the fatal focus of the vicious thrust. If this had been an accusation of the commission of an offense not involved in the trial of the indictment and the commission of which would carry no direct significance as to the guilt or innocence of the accused, it would not have borne such grave consequences, but it was much more than this. If the charges made by the district attorney were true, the guilt of the defendants of the offense described in the indictment would be all but conclusive. The general public believe the district attorney to be a man of unusual qualities and unquestioned integrity. Men, therefore, give more than ordinary credence to information emanating from such a source. In the opinion handed down by the Circuit Court of Appeals such conduct on the part of the district attorney is very properly condemned (Tr., 1429), and then such opinion undertakes to relieve the district attorney in the present case by saying:

> "It should be said of the present case that it does not appear that the district attorney was guilty of such conduct. The furtherest the affidavits go is to suggest that newspapers put statements in the mouth of the government attorney, which he did not deny." (Tr., 1430.)

But is it not true that his silence speaks as loudly as an admission? He had full opportunity to say to this jury that the purported interviews published by the various newspapers were false. If they were false, then, in view of his failure to deny them is not the conclusion justifiable, yes, actually compelling, that he wished whatever influence they might carry to continue throughout the trial in order to aid in a conviction? In such case, his failure to deny is the more reprehensible. During the oral argument in the Circuit Court of Appeals, presiding Judge Alschuler asked the district attorney if he had ever denied these interviews, and in answer he made the mere statement that he had not denied them. In all fairness we can place no other construction upon this than an admission that such interviews were given out by him. We, therefore, venture the statement that the portion of the opinion of the Circuit Court of Appeals dealing with the jury question should not rest upon or be at all supported by the conclusion made therein, to-wit:

> "That it does not appear that the district attorney was guilty of such conduct." (Tr., 1430.)

If these statements were false and the district attorney had spurned winning a conviction through unfair methods, would he not immediately have used every means in his power to refute them, and would he not have hastened to embrace the first opportunity to announce to the court and jury that they were false? We stress this subject for the reason that from the language of the opinion of the Circuit Court of Appeals we are led to

believe that its decision upon the jury question was not uninfluenced by the conclusion that the district attorney was not "guilty of such conduct."

Furthermore, these newspaper articles carried the same sting whether they were true or false in the absence of a denial from the district attorney. The average juryman would place some credence in these statements when the district attorney failed to deny them while standing before him on the *vior dire.*

Concerning the examination of the jurors by the defendants the opinion of the Circuit Court of Appeals seems to lay some stress upon the fact that the defendants did not exhaust all of their peremptory challenges. (Tr., 1430.) The defendants certainly would not be expected to ignore these newspaper publications on the *voir dire.* The defendants had, without success, resorted to every means in their command, in so far as the court was concerned, by a motion for a continuance and a motion to discharge the panel. In order to further protect themselves they followed a very proper and natural course, and that which seemed at the time to be a most prudent one, in examining each juror on this subject. It could not safely be ignored by the defendants, and thus reference to the statements of the district attorney made to the press were injected into the examination. Hence we do not believe it can reasonably be said that such action should militate against the defendants. They were not responsible for the situation. The responsibility rested with the district attorney. Nevertheless, the reference to the subject on the *voir dire* refreshed the minds of those who had read the articles and called it to the attention of those who had not. In this way the prejudicial effect of the subject would linger with every juror no matter how many talesmen were called. It became apparent during the examination that it was use-

less to further "strike" preemptorily for the reason that invariably the juror would say that he could try the case impartially notwithstanding that he had read the newspaper articles. Not one of the jurors examined who had read these articles would admit that he could not try the case impartially. Therefore, it seems quite apparent that any further exercise of the peremptory challenge would have accomplished nothing but a waste of time. There is one element in this connection which the opinion of the Circuit Court of Appeals seems to entirely overlook, but we believe it to be an important one which has been almost universally recognized not only by the courts, but in all human affairs. We refer to the fact that men are often unconsciously influenced by prejudice. It is a well known fact that "Some of the worst enemies of the man who is seeking for the truth will appeal to him as old friends in whom he has great confidence, and that one of the worst of these enemies is prejudice." The inflammatory and prejudicial nature of these interviews cannot be denied, and notwithstanding that each juror stated that he could try these defendants impartially, still the fact remains that they were exposed to this improper influence. The very nature of the matter is such as would create a presumption that the verdict was influenced thereby.

There is another important element to be considered in determining the effect of the answers of the jurors to the questions regarding this prejudicial matter. That is the element of pride found in every human being which repels him from odious comparison with his fellows. The first juror examined on this subject stated that he could try the cause fairly notwithstanding the fact that he had read the articles. Is it not true that the next juror examined would hesitate to say that he could not do so, especially after a rather insistent interrogation

by the court? The juror would feel that his intelligence was in the balance and his pride would dictate the answer, and not his conscience.

The opinion of the Circuit Court of Appeals further states that the defendants "challenged no juror for cause because he had read such articles." (Tr., 1430.) We submit that it is plain to be seen from the record of the *voir dire* that such a challenge would have been promptly denied by the court and that it is not unlikely that counsel would have drawn a reprimand from the court for his pains. It should also be recognized that such action would have been poor trial strategy, for the defendants felt that they could not carry the additional prejudice that might develop in the mind of a juror unsuccessfully challenged. The opinion further refers to the fact that the defendants peremptorily struck some who had not read the articles and concludes from this that the defendants "seemed not concerned about the subject." We insist that the premise does not justify the conclusion. This subject was not the only one that the defendants had in mind in the examination of the jurors. However, it is very apparent that it was uppermost in their thoughts. It is not strange that some jurors were challenged for other reasons. In so far as the one juror is concerned who had read the articles and who is mentioned in the opinion (Tr., 1430) as having been accepted without examination, we can only say that it may have been an oversight or it may have been considered a useless task in view of other examinations.

The opinion further states:

> "In fact many of the defendants did not join in the motions for a continuance, change of venue, or join in the demand for a new panel, and certainly as to them there exists no assignment of error. Moreover, the court was not justified in ignoring their wishes when it denied a continuance." (Tr., 1430.)

There were only two motions made in this connection—a motion for a continuance and a motion to discharge the panel. There was no motion for a change of venue. Forty of the sixty-three defendants joined in these motions. Only fifty-one of the sixty-three defendants were represented by counsel as is shown by the appearances entered. (Tr., 88 and 89.) Therefore, all but eleven of the defendants represented by counsel joined in these motions. It should be remembered that the determination on what steps to take regarding these articles and the preparation and signing of the motions had to be hastily done. The articles first appeared on the morning before the trial began, again in the late afternoon, and again on the morning of the first day of trial. There was no time to look up the defendants who were not represented, and counsel who did not sign were not available at the time. The truth is that no defendant refused to sign, nor did any defendant express unwillingness to join in the motions. We do not believe that the Circuit Court of Appeals is justified in the conclusion that any of the defendants were opposed to these motions. Furthermore, can it be said that, even though the few defendants who did not join refused to do so for reasons of their own not disclosed by the record, the defendants who did join in the motion should be forced to trial against a prejudice for which they were not responsible? Can it be reasonably said that a small minority of this great body of defendants, its very numbers casting a shadow on the justice of the verdict, should deprive the large majority of the right to have their guilt determined in the manner prescribed by law? The trial court did not know the wishes of this small minority, and did not inquire as to what they were, nor were they mentioned in the rulings on these motions. The court apparently ruled on what he considered at the time as the true merit contained in them.

We therefore submit that the conclusion that "the court was not justified in ignoring their wishes when it denied a continuance" is not a proper one, and if it was intended in any way to support the affirmance of the trial court, such support should be removed.

There further appears in the opinion on this subject the following:

> "Had the case been continued, the effect of the murder of the government's principal witness would have doubtless been as impressive at a later date as it was at the time of the trial." (Tr., 1430.)

It can hardly be conceived how this statement can be justified in view of the inflammatory and prejudicial character of the newspaper articles. This statement entirely ignores the fickleness of public sentiment. The case then about to be tried was one which had already been well advertised throughout the state and when the startling disclosure was made that on the eve of trial the principal witness for the government had been assassinated by this "desperate bunch" of defendants, it spread over the state as fast as modern agencies could carry it. The *voir dire* discloses that several jurors and those examined for jurors had heard it discussed. Public sentiment was momentarily whipped to a foam. Every juryman who responded to the summons and who had read or heard of these articles expected to see an army of armed guards patroling the corridors of the Federal Building during the trial, and a network of guards thrown around all government witnesses and agents to see that no one interfered with them in the progress of the trial, and guards watching all witnesses in the streets and at the local hotels during the trial to see that no harm came to them. These jurymen, to a great extent, saw what they expected to see. They saw guards in the court room and in the corridors of the

Federal Building, just as predicted by the district attorney. This so-called precaution was taken by the district attorney for no other reason, as expressed by him, than to guard against vicious attacks made by these "desperate" defendants. All of this was well known to these jurymen. We are unable to describe the tenseness of the situation and the inflamed atmosphere in which this trial proceeded. In these circumstances, even 30 days' postponement would have relieved the pressure. The apparent frenzy of the district attorney would have been dispelled. The apparent necessity of guards would have been removed. Public sentiment would have greatly subsided. Further knowledge would have been gained by the public in the calm to follow, and these defendants would have appeared at the bar of justice more like ordinary human beings charged with an offense quite common.

The opinion also recites the following:

> "Fortunately, the articles appeared before any jury was drawn. So far as they told of Monte's murder, nothing was related that was not proved at the trial. As to the cause of the murder, and the identity of the murderers, it was not a matter involved in the trial of this case." (Tr., 1430.)

We are not intending to hold the Circuit Court of Appeals too strictly to the literal meaning in any isolated portion of the opinion but we wish to call this court's attention to the fact that the above words do not seem to give proper place to the newspaper articles in so far as such words state that nothing was related therein that was not proved upon the trial. The evidence merely showed that Monte had been killed and nothing more. We believe but one witness was asked regarding this and he testified merely to the fact that Monte had been killed. (Tr., 339.) It will be appreciated by this court that the mere fact that Monte was killed is not in any sense the

basis of this argument. These articles told much more than the mere fact that Monte had been murdered. They accused these defendants of committing the murder in order to protect themselves from his testimony in behalf of the government. They accused these defendants of being a "desperate bunch." They told that his testimony was of great importance and that he was the principal witness for the government, and especially against two of the principal defendants. They told that the district attorney was so convinced of these facts that this murder only bore out his belief that the Lake County defendants were a "desperate bunch" and that the government must not spare any pains to safeguard the witnesses and agents connected with the case. They told that he was going to increase the force and throw around every government witness a network of guards, and take steps to patrol the corridors of the Federal Building during the trial with guards armed with guns and with orders to prevent any tampering with witnesses. They told that these guards would watch all witnesses in the streets and in the local hotels during the trial to see that no harm came to them. They told that guards from other states would be brought into the city and to Gary to prevent any one from approaching the witnesses in any way; that one man was arrested recently at Gary for attempting to tamper with a government witness. They told that Tom Keussis and Mrs. Keussis had been attacked Saturday night at Gary, presumably because of their connection with the case. All of the above was quoted as coming from the district attorney, and the district attorney has never denied such statements. In view of this, can it be accurately said regarding these articles that "so far as they told of Monte's murder, nothing was related that was not proved upon the trial?"

In so far as the opinion states "as to the cause of the

murder, and the identity of the murderers, it was not a matter involved in the trial of this case," it is an accurate statement. We believe, however, that the fact alone that it was not involved in this case is the principal reason for its harm. If these newspaper articles had made mere comments, as are usually made, regarding the real issues involved, it is not likely that much harm or prejudice would have resulted. In this day of universal reading of current news, all intelligent men expect to read some comments in the press regarding the issues involved in a case of any prominence and it could not be said that their mere reading of such would create such a lasting impression upon their minds as to influence them, provided they so testified on the *voir dire*. We are not so zealous in behalf of these petitioners as to say that if this case came within such a class we would be here asking for a rehearing. In the case of *Reynolds* v. *United States*, 98 U. S. 145, cited in the opinion, the plaintiff in error complains of the denial by the trial court of the challenge of a juror for cause simply because the juror in a very meagre examination stated that he had formed an opinion, but that he did not think such opinion would influence his verdict. This was all of the evidence before the court, and the court very properly denied the challenge, and such ruling was affirmed by the Supreme Court. That case is very far from being in a class with the present one. There was nothing in that case that could be said to be at all analogous to the case here.

It is also stated in the above quoted portion of the opinion that "fortunately, the articles appeared before any jury was drawn." As a matter of fact, certain newspapers in Indianapolis published substantially the same articles on the day the jury was sworn to try the cause, to-wit: March 14th. Of course, this is not shown

in the motions and affidavits, but the affidavits do state that such articles will be re-written and re-published in other newspapers over the district. This, of course, is a self-evident fact and follows as naturally as the night follows the day. Therefore, it cannot accurately be said that all such articles appeared before the jury was drawn. Each juror who was sworn to try the cause, and who had not already read such articles, would of course be curious to see them, and human experience tells us that each one of said jurors either read the articles, copies of which were made a part of the motions, or similar articles published thereafter, and in view of the fact that the district attorney failed to deny any of the interviews he was quoted as having made, each juror would very naturally believe that these interviews recited the truth. So that we respectfully take issue with this statement that such articles all appeared before any jury was drawn. Of course, it is true that the showing made in support of the motions does not disclose that any such articles were thereafter published, but it is certainly a legitimate and natural assumption that other newspapers would take it up. We believe that this assumption should be made in favor of the defendants under all of the circumstances in this case. If this court considers the evidence of the *voir dire* in support of the court's rulings on these motions notwithstanding that such evidence was heard after the ruling, then we submit that the plaintiff in error is entitled to some consideration on reasonable assumption. We are convinced that if these articles made a part of the motions had been published after the jury was sworn, there is no doubt that the judgment in this case would have been reversed. This being true, and it being a fair and reasonable assumption that similar attacks were published after the jury was sworn, we believe there should be a like decision on this ques-

tion. The record shows that there were some jurors sworn to try the cause who had not read these articles, but is any man going to say that they did not thereafter read them, or similar articles thereafter published? If so, they fail to comprehend the inquisitive nature of mankind. If the district atorney had seen fit to announce to the court and jury that these interviews did not state the truth, much of the sting of such articles would have been removed. He had an abundance of opportunity to do this during the examination of the jury. If he believed that to do so would have injured the cause of the government, then certainly it would necessarily follow that his failure to do so would injure the cause of the defendants.

The fact that the jury acquitted seven of the defendants charged does not in any sense indicate that its verdict was free from the prejudice fomented by these publications. Four of the acquitted defendants lived in the Town of Hobart, which is ten miles east of the City of Gary; two of such defendants lived in the Town of Crown Point, which is fifteen to twenty miles south of the City of Gary. Only one of such defendants, Joseph De Marti, Jr., lived in the City of Gary, and there was no evidence which would even create a suspicion that he was involved in the conspiracy charged. It is not a mere postulate to say that the verdict was geographical rather than individual, and this alone gives strong support to the contention that the verdict was partial and seriously influenced by the interviews given out by the district attorney.

We fail to find in any reported case where a like situation has been presented to the court for decision, but we believe the following cases on this subject give strong support to the contention of your petitioners:

Mattox v. *United States*, 146 U. S. 140.

Waldron v. *Waldron*, 156 U. S. 361, 383.

Throckmorton v. *Holt*, 180 U. S. 552, 567.
Hopt v. *Utah*, 120 U. S. 430.
Harrison v. *United States*, 200 Fed. 662.
Morse v. *Montana Ore Purchasing Co.*, 105 Fed. 337, 345.
United States v. *Marrin*, 159 Fed. 771, 775.
United States v. *Ogden*, 105 Fed. 371.
Meyer v. *Cadwalader*, 49 Fed. 32.
August v. *United States*, 257 Fed. 388, 392.
Green v. *State*, 53 So. 415.

We earnestly contend that this question is a unique one, remains unsettled, and is of such general public importance as to justify this court in giving it consideration. The importance of this question is by no means confined to the litigants here involved.

Point II.

A fair and impartial trial was not possible with the unprecedented number of parties defendant, even in the absence of the prejudice created by the published interviews of the United States attorney in charge of the prosecution. In support of this fact we point to the unlawful and violent inferences which the jury must have drawn in order to render a verdict of guilty against numerous defendants. (See next Point.)

Little need be said regarding this subject because it seems to us a self-evident fact that such an agglomeration of defendants is a fatal obstacle to a properly considered verdict. Where there are so many individual defendants and groups of defendants, each being in an entirely different situation, the field of evidence has almost no boundaries. Fatal prejudice is inevitable in such a case. We recall that in the case of *Heitler* v.

United States, 274 Fed. 401, cited in the opinion of the Circuit Court of Appeals, his Honor Judge Evans, remarked that: "The present trial convinces the court that thirty defendants is a large number to try at one time."

We cannot here point to precedent, for we are unable to find such in any reported case.

Point III.

Unfair and unlawful inferences must have ben drawn by the jury. We do not here ask this court to weigh the evidence for we are well aware that it cannot do so. We do ask, however, that the legal sufficiency of the evidence be given consideration in connection with the other questions of law herein presented. If it were not for the fact that such other questions have an intimate bearing upon this point we would not have the temerity to present it in this court. The question we wish to present is whether the material allegations of the indictment are supported by substantial evidence. There is no direct evidence against your petitioners named in the second group of the classification hereinabove made, except that they sold intoxicating liquor.

The opinion of the Circuit Court of Appeals very properly recites: "It is true if there be no other evidence than the mere sale of liquor, the conspiracy is not shown. *Heitler* v. *United States*, 24 Fed. 401." (Tr., 1419.)

Then the opinion asks: "But did these defendants merely sell liquor? What of the evidence showing their campaign contributions, their payment of protection money, and payment of graft money when arrested?" There is no evidence of this kind in the record against your petitioners named in the second group, except that

two of them contributed to the campaign fund of the defendant Roswell O. Johnson in his candidacy for Mayor of the City of Gary—Matt Buconich, $50.00 to his primary campaign fund (Tr., 518) and Joe Lamont, $100.00 to his election campaign fund. (Tr., 299.) The other petitioners in this group did not contribute anything. There is not a scintilla of evidence in the record that any of these petitioners paid protection money or graft money when arrested.

We will not prolong this brief by a recital of all of the evidence against each of these petitioners, but only call attention to the evidence against Vito Schiralli, the last one named in the second group. The evidence against him is as follows:

> On July 15, 1922, a state agent, Lyle by name, bought a half pint of moonshine in this petitioner's place, for which he paid one dollar and then gave it to some government agents who were waiting on the outside, and the latter brought the moonshine into court as evidence. (Tr., 269.) This agent Lyle testified that he bought moonshine there, and that he saw papers and a badge which indicated that Schiralli was a Deputy Sheriff, and that Schiralli told him he had been appointed Deputy Sheriff by Sheriff Olds. Tr., 321.) Schiralli was arrested twice and his place searched twice by the police of the City of Gary. (Tr., 1000.)

This is all of the evidence against this petitioner. His appointment as Deputy Sheriff by Sheriff Olds cannot be evidence of his participation in the conspiracy charged for the reason that the trial court granted the defendant Olds a new trial. (Tr., 68 and 69.) Thus in effect holding that he was not involved in the offense charged, and the government afterward dismissed as to him. The record further shows that most of these petitioners were arrested and their places investigated and searched numerous times by the police of the City of Gary. (Tr., 999 and 1000.)

The evidence does not disclose what disposition was made of their cases when they were arrested, nor does the evidence disclose what fees they paid to their attorney for representing them, nor, in fact, that they hired any lawyer at all. Therefore, there could be no inference that they paid graft money when arrested, or paid for protection.

There being no direct evidence of the offense charged, there can be no legal conviction unless there be circumstantial evidence from which an inference of guilt may be *fairly* drawn. The following seems to be an accurate definition of circumstantial evidence:

> "Evidence that tends to prove a fact in issue by proving other events or circumstances which, according to the common experience of mankind, are *usually* or *always* attended by the fact in issue and *therefore affords a basis for a reasonable inference*, by the jury or court of the occurrence of the fact in issue."

The conviction of these petitioners, or any one of them, should not stand unless the evidence concerning them will square with this definition of circumstantial evidence, and we respectfully submit that it will not.

The rule concerning substantial evidence is applicable to all criminal cases, including those involving violation of the Volsted Act, notwithstanding the desire of the executive department of the government to enforce such law.

Point IV.

The opinion of the Circuit Court of Appeals lays down the rule that that court will not draw a distinction between "evidence" and "substantial evidence." (Tr., 1415 and 1416.) We contend that this is not in conformity with decisions rendered in other Circuits, and

that in the interest of uniformity of decision on this important subject, the question should be here considered.

It is not our intention to place a wrong construction upon any statement made in the opinion of the Circuit Court of Appeals, but we have carefully studied this portion of the opinion and are unable to arrive at any other conclusion than that it states a rule contrary to the decisions of this court and of most, if not all, of the decisions of the other Circuits.

In view of the fact that the evidence concerning many of the defendants below is **not** conflicting and is only of circumstances from which a fair inference of guilt **cannot be drawn**, we are constrained to place a literal construction upon the statement that: **"It is of no avail for counsel to cite cases which have attempted to draw a distinction between 'evidence' and 'substantial evidence.'"** It is true there follows some discussion on the question of weighing conflicting evidence; nevertheless, the rule laid down, as above quoted, must have been applied to numerous plaintiffs in error in this case, including the petitioners named in the second group classification herein made, for in such cases the question of conflict in, and weight of, the evidence is not involved. The only question involved is whether the material allegations of the indictment were supported by the proof of circumstances which afford a basis for a reasonable inference of guilt. Certainly there must be substantial evidence of inculpatory participation in the conspiracy charged.

All of the decisions of this court, so far as we have been able to find, recognize the rule that the evidence inculpating the defendant must be substantial before the court is justified in submitting the issues to a jury. We find this rule announced from the case of *United States* v. *Ross*, 92 U. S. 281 (often cited) to the case of *Stillson* v. *United States*, 250 U. S. 583.

Your petitioners desired to file a petition for rehearing in the Circuit Court of Appeals, but by their oversight, or that of their attorneys who represented them below, it was delayed until too late to do so. It may be here stated that the petitions for rehearing filed in this cause in the Circuit Court of Appeals by numerous plaintiffs in error are still undisposed of in that court.

Your petitioners present herewith as a part of this petition and brief a certified copy of the transcript of the record, including all proceedings in the United States Circuit Court of Appeals for the Seventh Circuit.

In conclusion, we respectfully urge that the questions here presented, when viewed in their intimate relationship with each other, bring before this court a matter of such public import as to call for consideration.

WHEREFORE, in view of the premises, your petitioners pray that this honorable court will grant its writ of *certiorari* directed to the United States Circuit Court of Appeals for the Seventh Circuit, requiring that the record of said cause in the said court and its judgment be certified to this court, and that this court will thereupon proceed to correct the errors complained of, reverse the said judgment and remand the said cause, and give to your petitioners such other and further relief as the nature of the case may require and to the court may seem proper in the premises.

C. B. TINKHAM,
Attorney for Petitioners.

A. E. TINKHAM,
F. R. MURRAY,
Of Counsel.

STATE OF ILLINOIS, } ss:
COUNTY OF COOK. }

C. B. TINKHAM, being first duly sworn, says that he is one of the counsel for the petitioners named in the above and foregoing petition, that he prepared said petition, and that the allegations thereof are true, as he verily believes.

.....

Subscribed and sworn to before me this .... day of ......, 1925.

.....
Notary Public.

My Com. Exp. .....

BENJAMIN W. MORSE *v.* THE UNITED STATES OF AMERICA.

HARRY F. MORSE *v.* THE UNITED STATES OF AMERICA.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 597 and 598. Argued January 9, 1925.—Decided February 2, 1925.

1. Appellants were arrested under a federal indictment in New York while traveling through the State to attend trial under another indictment which they had given bail to answer in the District of Columbia, and were thus prevented from being present there at the time set. *Held* that the arrest was not in violation of the due process of law clause of the Fifth Amendment. P. 81.
2. Even if arrest in such circumstances be a breach of comity as between the two federal tribunals, the objection does not concern the constitutional rights of the persons arrested; nor involve a question of jurisdiction or any error reviewable on *habeas corpus*. *Id.*
3. A judgment of a District Court in *habeas corpus* which discharges a defendant held by a commissioner under Rev. Stats. § 1014 for removal to another district and which is based on a finding that the indictment does not charge a criminal offense, is not *res judicata* either as to the validity of the bench warrant issued by the court in which the indictment is pending or as to the sufficiency of the indictment itself. P. 82.

292 Fed. 273, affirmed.

APPEALS from judgments of the District Court dismissing writs of *habeas corpus*.

Mr. Nash Rockwood, with whom *Mr. Charles T. Lark* was on the brief, for appellants.

Mr. Assistant Attorney General Donovan, with whom *Mr. Solicitor General Beck* was on the brief, for appellee.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Appellants, under indictment in the District of Columbia, while passing through New York on February 6, 1923, on their way to Washington for trial, were arrested and taken from the train by a United States marshal upon bench warrants issued on federal indictments found in New York charging them with fraudulent uses of the mails. Previously, their removal to New York from Connecticut and Massachusetts, respectively, for trial under these indictments had been sought under § 1014 Rev. Stats. The removal of Harry F. Morse from Connecticut had been granted by the commissioner, but, upon *habeas corpus* proceedings, he had been discharged from custody by the Connecticut federal district court for want of probable cause, principally on the ground that the New York indictment was insufficient to charge a criminal offence, 287 Fed. 906; although the New York court had previously held it good. The proceedings for the removal of Benjamin W. Morse from Massachusetts were still pending before the commissioner at the time of the arrest. Both appellants were on bail to answer the District of Columbia indictment. Their case had been peremptorily set for trial on the morning following the arrest, and the effect of it was to prevent their appearance at the time set. Upon these facts, writs of *habeas corpus* were granted by the federal district court for the southern district of New York. After a hearing, the writs were dismissed and these appeals followed.

First. It is contended that the arrest of appellants in New York, while en route to Washington for trial, under the circumstances stated, was arbitrary, unauthorized and

illegal, and constituted a violation of the due process of law clause of the Fifth Amendment. The contention is plainly without merit. The principle that when the jurisdiction of a court has attached, it must be respected as exclusive until exhausted, is a rule of comity, having a wide application in civil cases but a limited one in criminal cases. *Peckham* v. *Henkel,* 216 U. S. 483, 486. The mutual forbearance which two federal courts having coordinate jurisdiction should exercise to prevent conflicts by avoiding interferences with the process of each other, has "perhaps no higher sanction than the utility which comes from concord." *Covell* v. *Heyman,* 111 U. S. 176, 182. But this aside, if there be a violation of the rule of comity here, it primarily concerns only the courts or the sovereignty which is their common superior, and cannot avail the appellants indicted for crimes in the different jurisdictions. Moreover, their constitutional rights are not affected; and if there was error in any respect, it is not reviewable on *habeas corpus. Peckham* v. *Henkel, supra,* p. 487; *Beavers* v. *Haubert,* 198 U. S. 77, 85. And see *In re Fox,* 51 Fed. 427, 430; *United States* v. *Marrin,* 170 Fed. 476, 479–480.

Second. It is urged that the decision of the federal district court in Connecticut discharging Harry F. Morse was *res judicata* and conclusively determined (1) that the New York bench warrant was illegally issued and therefore could not be made the basis for the subsequent arrest in New York; and (2) that the indictment was fatally defective. In respect of the first contention, it is enough to say that the warrant upon which the Connecticut arrest was made was that issued by the commissioner and not the New York bench warrant upon which the present arrest was made. The discharge of the prisoner determined that he could not be held upon the process issued by the commissioner. It had nothing to do with the question whether he could be arrested and held in New York

upon the process issued by the trial court. See *Ex parte Milburn*, 9 Pet. 704, 710; *Barbee* v. *Weatherspoon*, 88 N. C. 19, 20–22; *In re Begerow*, 136 Cal. 293, 299.

The second contention proceeds upon a complete misconception of the purpose for which the indictment is produced and considered in removal proceedings, and the authoritative effect of the ruling of the commissioner and the court on *habeas corpus* in respect thereof. The inquiry in such proceedings is whether there is probable cause to believe the prisoner guilty and justify his removal for trial. That inquiry may be made and the prisoner removed to the trial district in advance of indictment or without the production of the indictment if one has been found. *Greene* v. *Henkel*, 183 U. S. 249, 260; *Pierce* v. *Creecy*, 210 U. S. 387, 403; *United States* v. *Greene*, 100 Fed. 941, 943. The indictment was before the commissioner simply as evidence for the purpose of establishing or tending to establish the commission of an offense; and the commissioner had authority to pass upon its effect in that aspect only. The court reviewing the action of the commissioner under § 1014 upon *habeas corpus* was governed by the same rules and its decision was subject to the same limitation. *Henry* v. *Henkel*, 235 U. S. 219, 230; *Benson* v. *Palmer*, 31 App. D. C. 561, 564–565. Neither had authority to determine the sufficiency of the indictment as a pleading. "The only safe rule is to abandon entirely the standard to which the indictment must conform, judged as a criminal pleading, and consider only whether it shows satisfactorily that the fugitive has been in fact, however inartificially, charged with crime in the State from which he has fled." *Pierce* v. *Creecy, supra*, pp. 401, 402. In *Benson* v. *Henkel*, 198 U. S. 1, 12, this court said:

"While we have no desire to minimize what we have already said with regard to the indictment setting out the substance of the offense in language sufficient to apprise

the accused of the nature of the charge against him, still it must be borne in mind that the indictment is merely offered as proof of the charge originally contained in the complaint, and not as a complaint in itself or foundation of the charge, which may be supported by oral testimony as well as by the indictment. When the accused is arraigned in the trial court he may take advantage of every insufficiency in the indictment, since it is there the very foundation of the charge, but to hold it to be the duty of the Commissioner to determine the validity of every indictment as a pleading, when offered only as evidence, is to put in his hands a dangerous power, which might be subject to serious abuse. If, for instance, he were moved by personal considerations, popular clamor or insufficient knowledge of the law to discharge the accused by reason of the insufficiency of the indictment, it might turn out that the indictment was perfectly valid and that the accused should have been held. But the evil once done is, or may be, irremediable, and the Commissioner, in setting himself up as a court of last resort to determine the validity of the indictment, is liable to do a gross injustice."

See also *Benson* v. *Palmer, supra; United States* v. *Reddin,* 193 Fed. 798, 802; *In re Hacker,* 73 Fed. 464; *In re Dana,* 68 Fed. 886, 890; *Ex parte Mitchell,* 1 La. Ann. 413, 414. *Benson* v. *Palmer, supra,* contains a very full review of the precise question here under consideration. In the course of the opinion, the court, after pointing out that the discharge of the accused from the process under which he was held in the removal proceedings had nothing to do with the process upon which he was subsequently arrested and held by the trial court, that the indictment could be considered in such proceedings only as evidence, and that a finding thereon "concludes the proceedings for removal, but not for trial," said (p. 568): "It is not the policy of our criminal jurisprudence that an accused shall be permitted to escape trial on the merits of the

charge against him, through a mere defect in the preliminary proceedings leading up to the trial. No discharge by writ of *habeas corpus* will operate as a bar to further proceedings in the same cause, unless the inquiry on the petition for writ involves a full investigation into the merits of the case,—the guilt or innocence of the accused." It is unnecessary to refer to other authorities. While they are not entirely harmonious the rule to be deduced therefrom is that the judgment in a *habeas corpus* proceeding can be regarded as conclusive upon the merits only where the case presented is one which calls for a final determination of the ultimate facts and of the law; and not where the proceeding is preliminary and ancillary to a trial upon the merits. See, for example, *United States* v. *Chung Shee*, 71 Fed. 277, 280; *Kurtz* v. *State*, 22 Fla. 36, 45. Thus it is held that a judgment in a preliminary examination discharging an accused person for want of probable cause is not conclusive upon the question of his guilt or innocence and constitutes no bar to a subsequent trial in the court to which the indictment is returned. *Commonwealth* v. *Hamilton*, 129 Mass. 479, 481. Likewise, in extradition proceedings, a discharge for insufficient evidence will not preclude a second inquiry. *In re Kelly*, 26 Fed. 852. And see *Collins* v. *Loisel*, 262 U. S. 426, 429; *In re Begerow*, *supra*, p. 298. The functions of the commissioner and the court in removal proceedings under § 1014 are of like character and exercised with like effect. The judgment rendered therein, whatever may be its effect in subsequent proceedings of the same character involving the same question—*Salinger* v. *Loisel*, 265 U. S. 224, 230–232; *Collins* v. *Loisel*, *supra*, p. 430; *United States* v. *Haas*, 167 Fed. 211, 212—does not abridge the power of the trial court to deal independently with the main cause if the accused be subsequently arrested and brought before that court to answer to the indictment. In other words, the commissioner, or the court in review on *habeas corpus*, for

lack of power cannot conclusively adjudge the indictment, *qua* indictment, to be either good or bad or pass finally upon the guilt or innocence of the accused. A decision discharging the prisoner neither annuls the indictment nor blots out the offence. Upon the case here presented, the trial court alone had plenary jurisdiction over the cause and consequently alone had plenary power to pass upon the sufficiency of the indictment as the pleading which initiated and was the foundation of the prosecution.

Judgment affirmed.

Mandate to issue forthwith.